

## 32 Am. Jur. 2d False Pretenses Summary

American Jurisprudence, Second Edition | May 2021 Update

### False Pretenses

Lucas Martin, J.D.

### [Correlation Table](#)

## Summary

### Scope:

This article discusses the offense of obtaining money or property by false pretenses. Specifically discussed are definitions and distinctions of the offense from other crimes, the elements of the offense, attempts to commit the offense, and prosecution of persons committing such offense. Also discussed are other related offenses involving fraud or deception, including offenses involving checks, obtaining money or property through confidence games, and false statements or claims by, against, or to influence government officials.

### Federal Aspects:

This article discusses federal statutes relating to the offenses of taking or using papers related to claims against the government, without authority; conspiracy to defraud the government with respect to claims; making false, fictitious, or fraudulent claims upon or against the government; withholding military discharge papers; solicitation of employment and receipt of unapproved fees concerning federal employees' compensation. Also discussed are federal statutes relating to false statements or entries, generally; possession of false papers to defraud the government; fraudulent demands against the government; false, forged, or counterfeit statements or documents in connection with action of the Federal Deposit Insurance Corporation; fraudulent or false statements or reports as to transactions with the Department of Housing and Urban Development; false statements with regard to federal land bank mortgage transactions; fraud by false pretense or representations as to farm loan bonds and credit bank debentures; fraud by overvaluing any land, property, or security for the purpose of influencing a federal loan or credit application; fraud relating to naturalization, citizenship, or registry of aliens; fraudulent use of government seals; false statements in a certificate by persons authorized to give such certificate or writing; false certification of documents by consular officers; false statements, representations, or reports in connection with highway projects; fraud in connection with arms, equipment, ammunition, clothing, military stores, or other property; fraud or false pretenses on the high seas; fraud and related activity in connection with identification documents; false statements relating to health care matters; false claims relating to major disaster declarations; false claims to the government for payment, and various other federal statutes. The treatment of false federal credit institution reports, entries, and transactions is discussed in [Am. Jur. 2d, Banks and Financial Institutions §§ 443 to 449](#); false acknowledgment, certificate, or statement concerning the appearance by an officer authorized to administer oaths or take and certify acknowledgments is discussed in [Am. Jur. 2d, Acknowledgments § 94](#); false statements and concealment of facts in relation to documents required by ERISA is discussed in [Am. Jur. 2d, Pensions and Retirement Funds § 707](#).

### Treated Elsewhere:

Access devices, fraud and related activity in connection with, see [Am. Jur. 2d, Telecommunications § 197](#)

Advertising, regulation of, generally, see [Am. Jur. 2d, Advertising §§ 7 et seq.](#)

Bank offenses: wrongful certification of checks by officer, director, agent, or employee of certain banks or organizations, see [Am. Jur. 2d, Banks and Financial Institutions § 433](#); making false entries in any book of such bank, see [Am. Jur. 2d, Banks and Financial Institutions §§ 443 to 445](#); making false entry in reports or statements of such bank, see [Am. Jur. 2d, Banks and Financial Institutions §§ 446 to 449](#)

Bankruptcy, nondischargeability of debts incurred through false pretenses, false representation, or actual fraud, see [Am. Jur. 2d, Bankruptcy §§ 3541 to 3569](#)

Computer Fraud and Abuse Act, see [Am. Jur. 2d, Computers and the Internet §§ 238 to 243, 246 to 254](#)

Corporate agent as subject to criminal liability for obtaining anything of value for corporation by false pretense, and corporate officer as subject to prosecution for drawing or issuing check with knowledge of insufficient funds to meet check on presentment, see [Am. Jur. 2d, Corporations § 1623](#)

Counterfeiting, see [Am. Jur. 2d, Counterfeiting §§ 1 et seq.](#)

Credit cards, offenses including those pertaining to fraudulent use, obtaining of, and forgery in use of, see [Am. Jur. 2d, Credit Cards and Charge Accounts §§ 32 to 53](#)

Deportation for aliens for falsification of documents or falsely claiming citizenship, see [Am. Jur. 2d, Aliens and Citizens §§ 1538 to 1542](#)

Embezzlement, see [Am. Jur. 2d, Embezzlement §§ 1 et seq.](#)

False advertising, see [Am. Jur. 2d, Advertising §§ 3, 4](#)

False personation, see [Am. Jur. 2d, False Personation §§ 1 et seq.](#)

Federal Fair Credit Reporting Act, criminal liability thereunder for obtaining information under false pretenses, see [Am. Jur. 2d, Collection and Credit Agencies § 92](#)

Forgery, generally, see [Am. Jur. 2d, Forgery §§ 1 et seq.](#)

Fraud, generally, see [Am. Jur. 2d, Fraud and Deceit §§ 1 et seq.](#); false pretenses as means of perpetrating see [Am. Jur. 2d, Fraud and Deceit §§ 48 et seq.](#)

Fraudulent conveyances, generally, see [Am. Jur. 2d, Fraudulent Conveyances §§ 1 et seq.](#)

Hotels, restaurants, or similar establishments, criminal offense of obtaining accommodations by use of false pretenses, see [Am. Jur. 2d, Hotels, Motels, and Restaurants § 68](#)

Identity theft, see [Am. Jur. 2d, Larceny § 63](#)

Insurance: against loss as result of theft, burglary, larceny, or false pretenses, see [Am. Jur. 2d, Insurance § 497](#); loss by false pretenses as affecting coverage of banker's blanket bond, see [Am. Jur. 2d, Insurance § 506](#)

Larceny, generally, see [Am. Jur. 2d, Larceny §§ 1 et seq.](#)

Mail service: prohibition of use in furtherance of a scheme or artifice to defraud, or to obtain money or property by means of false or fraudulent pretenses, see [Am. Jur. 2d, Post Office §§ 119 et seq.](#); offense of stealing or forging of mail locks or keys, see [Am. Jur. 2d, Post Office § 100](#); offenses of presenting false claim for postal losses, see [Am. Jur. 2d, Post Office § 100](#)

Receiving and transporting stolen property, see [Am. Jur. 2d, Receiving and Transporting Stolen Property §§ 1 et seq.](#)

Short weight, offense of selling merchandise or goods at, see [Am. Jur. 2d, Weights and Measures § 41](#)

Veterans: criminal liability for fraudulent acceptance of veterans' benefits, see [Am. Jur. 2d, Veterans and Veterans' Laws § 40](#); criminal liability for false claims for veterans' pensions or payments thereof, see [Am. Jur. 2d, Veterans and Veterans' Laws § 166](#)

Welfare or public relief payments, obtaining by means of fraudulent representation as prosecuted under penal laws relating to crime of larceny or theft by false pretenses, see [Am. Jur. 2d, Welfare Laws § 111](#)

Wire, radio, or television communications in interstate or foreign commerce, transmission to execute scheme or artifice to defraud, or to obtain money or property by means of false or fraudulent pretenses, representations, or promises, see [Am. Jur. 2d, Telecommunications § 196](#)

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## 32 Am. Jur. 2d False Pretenses I Refs.

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### I. In General; Definitions and Distinctions

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## Research References

### West's Key Number Digest

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### A.L.R. Library

A.L.R. Index, False Pretenses

A.L.R. Index, Fraud and Deceit

A.L.R. Index, Tricks and Trickery

West's A.L.R. Digest, [False Pretenses](#)  1, 2, 20.5, 22, 23

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## 32 Am. Jur. 2d False Pretenses § 1

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False Pretenses

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### I. In General; Definitions and Distinctions

## § 1. Definitions

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### West's Key Number Digest

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### A.L.R. Library

[Validity, Construction, and Application of State Computer Crime and Fraud Laws, 87 A.L.R.6th 1](#)

### Trial Strategy

[Scams and Cons, 74 Am. Jur. Proof of Facts 3d 63](#)

"False pretenses" is the unlawful acquisition of property pursuant to a false representation.<sup>1</sup>

What constitutes the crime of obtaining property by false pretenses in a given jurisdiction depends on the statute setting forth the crime, and the judicial construction thereof.<sup>2</sup> Modern false pretenses statutes name the offense "theft by deception," or something similar, and set forth the elements of the offense.<sup>3</sup> Generally, such statutes or related statutes also define "deception."<sup>4</sup> A scheme to defraud includes any plan or course of action by which someone uses false, deceptive, or fraudulent pretenses, representations, or promises to deprive someone else of money.<sup>5</sup>

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### Footnotes

<sup>1</sup> [State v. Murphy, 152 N.C. App. 335, 567 S.E.2d 442 \(2002\).](#)

- <sup>2</sup> People v. Petro, 179 Ill. App. 3d 1018, 128 Ill. Dec. 883, 535 N.E.2d 97 (4th Dist. 1989); Kollar v. State, 556 N.E.2d 936 (Ind. Ct. App. 1990); State v. Schultz, 252 Kan. 819, 850 P.2d 818, 33 A.L.R.5th 835 (1993); State v. Burroughs, 333 Md. 614, 636 A.2d 1009 (1994).
- <sup>3</sup> Tesoro Refining and Marketing Company, L.L.C. v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania, 833 F.3d 470 (5th Cir. 2016) (Under Texas law); Ex parte Stinson, 631 So. 2d 831 (Ala. 1992); Linne v. State, 674 P.2d 1345 (Alaska Ct. App. 1983); Clark v. State, 308 Ark. 84, 308 Ark. 453, 824 S.W.2d 345 (1992); People v. Carlson, 72 P.3d 411 (Colo. App. 2003); Scott v. State, 277 Ga. App. 876, 627 S.E.2d 904 (2006); People v. Perry, 224 Ill. 2d 312, 309 Ill. Dec. 330, 864 N.E.2d 196 (2007); State v. Schultz, 252 Kan. 819, 850 P.2d 818, 33 A.L.R.5th 835 (1993); People v. Jory, 443 Mich. 403, 505 N.W.2d 228 (1993); Mississippi State Bd. of Nursing v. Wilson, 624 So. 2d 485 (Miss. 1993); State v. Lue, 813 S.W.2d 922 (Mo. Ct. App. E.D. 1991); State v. Krueger, 241 N.J. Super. 244, 574 A.2d 1006 (App. Div. 1990); State v. Worden, 115 Or. App. 376, 838 P.2d 640 (1992); State v. Kessler, 2009 SD 76, 772 N.W.2d 132 (S.D. 2009); Swinson v. Com., 16 Va. App. 923, 434 S.E.2d 348 (1993).
- <sup>4</sup> McElroy v. State, 571 So. 2d 353 (Ala. Crim. App. 1990); Linne v. State, 674 P.2d 1345 (Alaska Ct. App. 1983); Clark v. State, 308 Ark. 84, 308 Ark. 453, 824 S.W.2d 345 (1992); State v. Schultz, 252 Kan. 819, 850 P.2d 818, 33 A.L.R.5th 835 (1993); Com. v. Burnette, 875 S.W.2d 865 (Ky. 1994); State v. McMellen, 872 S.W.2d 508 (Mo. Ct. App. W.D. 1994); State v. Hurst, 507 N.W.2d 918 (S.D. 1993); State v. Doe, 825 P.2d 681 (Utah Ct. App. 1992); Sylvestre v. Com., 10 Va. App. 253, 391 S.E.2d 336 (1990); State v. Smith, 115 Wash. 2d 434, 798 P.2d 1146 (1990).
- <sup>5</sup> U.S. v. Jamieson, 427 F.3d 394, 68 Fed. R. Evid. Serv. 825, 2005 FED App. 0430P (6th Cir. 2005).

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## 32 Am. Jur. 2d False Pretenses § 2

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### False Pretenses


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#### I. In General; Definitions and Distinctions

### § 2. Construction of false pretenses statutes

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#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  1, 2

False pretenses statutes are to be given their plain meaning,<sup>1</sup> but, as penal statutes, they must be construed strictly so that nothing not within their words will be held within their meaning.<sup>2</sup> However, they should not be construed so narrowly so as to disregard the statute's purpose.<sup>3</sup> Whether a defendant may be found guilty of the statutory crime of false pretenses does not depend on whether he or she could have been found liable based on a civil fraud complaint.<sup>4</sup>

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#### Footnotes

<sup>1</sup> State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993); State v. Markarian, 551 A.2d 1178 (R.I. 1988); State v. Dale, 439 N.W.2d 98 (S.D. 1989); Briones v. State, 76 S.W.3d 591 (Tex. App. Corpus Christi 2002); State v. Coando, 784 P.2d 1228 (Utah Ct. App. 1989), aff'd, 858 P.2d 926 (Utah 1992); Sylvestre v. Com., 10 Va. App. 253, 391 S.E.2d 336 (1990).

Rule of lenity did not apply with respect to determining whether a defendant's use of a hotel room was property, such that it could be the subject of theft by deception, as the statutory term "property" was unambiguously defined. People v. Perry, 224 Ill. 2d 312, 309 Ill. Dec. 330, 864 N.E.2d 196 (2007).

<sup>2</sup> State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993); Bray v. Com., 9 Va. App. 417, 388 S.E.2d 837 (1990); State v. O'Neil, 141 Wis. 2d 535, 416 N.W.2d 77 (Ct. App. 1987); Bohling v. State, 2017 WY 7, 388 P.3d 502 (Wyo. 2017).

<sup>3</sup> State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993); State v. O'Neil, 141 Wis. 2d 535, 416 N.W.2d 77 (Ct. App. 1987); Smith v. State, 721 P.2d 1088 (Wyo. 1986).

<sup>4</sup> State v. Agosta, 173 Vt. 97, 787 A.2d 1252 (2001).





## 32 Am. Jur. 2d False Pretenses § 3

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False Pretenses


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### I. In General; Definitions and Distinctions

## § 3. Larceny by trick or fraud distinguished from false pretenses

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### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  1, 20.5

The critical difference between larceny crimes and false pretense crimes is the passage of title.<sup>1</sup> If the owner of property parts with both title and possession in reliance on the taker's fraudulent representations, the crime of the taker is obtaining property by false pretenses.<sup>2</sup> But if the fraud, trick, or false pretenses induce the owner to part merely with the possession of his or her property, the party who receives the property is guilty of the crime of larceny.<sup>3</sup>

### Observation:

In the context of a fraudulent check, "larceny" is the taking without right of the personal property of another with the specific intent to deprive the other of the property permanently.<sup>4</sup>

The distinction between larceny and obtaining money or property by false pretenses has been abolished by statute in some jurisdictions.<sup>5</sup> Under these statutes, larceny includes the offense of obtaining property or money by false pretenses.<sup>6</sup> In some jurisdictions the terms overlap and the crime of obtaining money or property by false pretenses, including the getting of title, may be called "larceny by false pretenses," "larceny by trick,"<sup>8</sup> or simply "larceny,"<sup>9</sup> as well as theft by deception.<sup>10</sup>

Signing a personal guaranty without the intent to repay a loan, if necessary, constitutes larceny by false promise.<sup>11</sup>

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### Footnotes

<sup>1</sup> [In re Newpower](#), 233 F.3d 922, 2000 FED App. 0408P (6th Cir. 2000) (applying Michigan law); [People v. Lorenzo](#),

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64 Cal. App. 3d Supp. 43, 135 Cal. Rptr. 337 (App. Dep't Super. Ct. 1976).  
As to necessity of obtaining title, see § 30.

<sup>2</sup> State v. Sabins, 256 Iowa 295, 127 N.W.2d 107 (1964); People v. Malach, 202 Mich. App. 266, 507 N.W.2d 834 (1993); Bohling v. State, 2017 WY 7, 388 P.3d 502 (Wyo. 2017).

<sup>3</sup> State v. Sabins, 256 Iowa 295, 127 N.W.2d 107 (1964); Wilkinson v. State, 215 Miss. 327, 60 So. 2d 786 (1952); Bohling v. State, 2017 WY 7, 388 P.3d 502 (Wyo. 2017).

<sup>4</sup> Com. v. Green, 66 Mass. App. Ct. 901, 845 N.E.2d 392 (2006).  
As to offenses as to checks, see §§ 60 to 70.

<sup>5</sup> Schmitt v. State, 634 N.E.2d 71 (Ind. Ct. App. 1994); State v. Rios, 246 Kan. 517, 792 P.2d 1065 (1990).

<sup>6</sup> Rhyne v. H & B Motors, 505 So. 2d 307 (Ala. 1987); State v. Robins, 34 Conn. App. 694, 643 A.2d 881 (1994), judgment aff'd, 233 Conn. 527, 660 A.2d 738 (1995); Van Vechten v. American Eagle Fire Ins. Co., 239 N.Y. 303, 146 N.E. 432, 38 A.L.R. 1115 (1925).

<sup>7</sup> Com. v. Stovall, 22 Mass. App. Ct. 737, 498 N.E.2d 126 (1986); People v. Codina, 110 A.D.3d 401, 972 N.Y.S.2d 247 (1st Dep't 2013); Bray v. Com., 9 Va. App. 417, 388 S.E.2d 837 (1990).

<sup>8</sup> Owolabi v. Com., 16 Va. App. 78, 428 S.E.2d 14 (1993).

<sup>9</sup> State v. Markarian, 551 A.2d 1178 (R.I. 1988); Reid v. Com., 65 Va. App. 745, 781 S.E.2d 373 (2016).

<sup>10</sup> Warner v. U.S., 124 A.3d 79 (D.C. 2015).  
California's definition of "theft" includes theft by false pretenses, which unlike larceny has no requirement of asportation. People v. Romanowski, 2 Cal. 5th 903, 215 Cal. Rptr. 3d 758, 391 P.3d 633 (Cal. 2017).

<sup>11</sup> Ponnappula v. Spitzer, 297 F.3d 172 (2d Cir. 2002) (applying New York law).

## 32 Am. Jur. 2d False Pretenses § 4

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## § 4. Embezzlement distinguished from false pretenses

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### West's Key Number Digest

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The crime of obtaining money by false pretenses, although akin to embezzlement, differs from embezzlement in that embezzlement is a fraudulent misappropriation of property which was lawfully obtained, whereas obtaining money or property by false pretenses is an unlawful taking of property in the first instance pursuant to a fraudulent representation.<sup>1</sup>

### Observation:

The crime of theft by embezzlement or by deception is completed at the time of conversion, and evidence of repayment or intent of repayment is irrelevant.<sup>2</sup>

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### Footnotes

<sup>1</sup> State v. Burroughs, 333 Md. 614, 636 A.2d 1009 (1994); State v. Speckman, 326 N.C. 576, 391 S.E.2d 165 (1990); State v. Joy, 65 Wash. App. 33, 827 P.2d 1065 (Div. 1 1992), opinion corrected, (May 26, 1992) and aff'd in part, rev'd in part on other grounds, 121 Wash. 2d 333, 851 P.2d 654 (1993).

<sup>2</sup> State v. Grimes, 111 Wash. App. 544, 46 P.3d 801 (Div. 1 2002), as amended, (May 2, 2002).



## 32 Am. Jur. 2d False Pretenses § 5

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### False Pretenses


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#### I. In General; Definitions and Distinctions

### § 5. Forgery distinguished from false pretenses

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#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  1, 2, 20.5

The offenses of obtaining money by false pretenses and of forgery are closely akin in that false pretense is the heart of forgery and the two offenses sometimes overlap.<sup>1</sup> The principal difference between the two offenses is that forgery pertains exclusively to a writing, whereas false pretenses covers both written and parol fraudulent deceptions.<sup>2</sup> Forgery is treated as a separate offense because a fraud perpetrated in offering a writing or in making a false writing tends directly to destroy the security that permanent monuments in writing give to transactions affecting the more important rights of persons privy to them; forgery became a separate and graver offense, but the gist of forgery still is fraud.<sup>3</sup>

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#### Footnotes

- <sup>1</sup> U.S. v. Gugino, 860 F.2d 546 (2d Cir. 1988); U.S. v. Nathan, 816 F.2d 230, 22 Fed. R. Evid. Serv. 1433 (6th Cir. 1987); U.S. v. Sayan, 968 F.2d 55 (D.C. Cir. 1992); People v. Veasey, 251 Ill. App. 3d 589, 190 Ill. Dec. 929, 622 N.E.2d 1246 (2d Dist. 1993); State v. Koplin, 402 N.W.2d 423 (Iowa 1987).
- <sup>2</sup> U.S. v. Nathan, 816 F.2d 230, 22 Fed. R. Evid. Serv. 1433 (6th Cir. 1987); U.S. v. Sayan, 968 F.2d 55 (D.C. Cir. 1992); Houston v. State, 528 N.E.2d 818 (Ind. Ct. App. 1988); State v. Markarian, 551 A.2d 1178 (R.I. 1988); State v. Tolliver, 149 Wis. 2d 166, 440 N.W.2d 571 (Ct. App. 1989).
- <sup>3</sup> Peoples Bank & Trust Co. v. Fidelity & Cas. Co. of N. Y., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950); State v. Gomez, 722 P.2d 747 (Utah 1986).

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## 32 Am. Jur. 2d False Pretenses § 6

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### I. In General; Definitions and Distinctions

## § 6. Who may commit offense of false pretenses

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### West's Key Number Digest

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### A.L.R. Library

[Embezzlement, larceny, false pretenses, or allied criminal fraud by a partner, 82 A.L.R.3d 822](#)

A partner cannot be guilty of embezzlement or related crimes with respect to partnership property, since the partnership relationship places title to partnership property in all of the partners.<sup>1</sup> Authority also exists, however, for a contrary view.<sup>2</sup>

In order to convict a person of obtaining money by false pretenses on the ground that he or she made false representations to induce people to join a partnership and then took their money, a showing must be made that the partnership was formed as part of a scheme to defraud and not as a going concern formed in good faith.<sup>3</sup>

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### Footnotes

- <sup>1</sup> [People v. Clayton, 728 P.2d 723 \(Colo. 1986\); People v. Zinke, 76 N.Y.2d 8, 556 N.Y.S.2d 11, 555 N.E.2d 263 \(1990\).](#)
- <sup>2</sup> [People v. Mellor, 161 Cal. App. 3d 32, 207 Cal. Rptr. 383 \(4th Dist. 1984\); State v. Sylvester, 516 N.W.2d 845 \(Iowa 1994\).](#)
- <sup>3</sup> [People v. Sobiek, 30 Cal. App. 3d 458, 106 Cal. Rptr. 519, 82 A.L.R.3d 804 \(1st Dist. 1973\).](#)

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Works.

## 32 Am. Jur. 2d False Pretenses § 7

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### § 7. Who may commit offense of false pretenses—Corporations and agents thereof

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#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  1, 23

#### A.L.R. Library

[Criminal liability of corporation for extortion, false pretenses, or similar offenses, 49 A.L.R.3d 820](#)

Against the contention that, since intent is an element of the offense of obtaining money or property by false pretenses,<sup>1</sup> a corporation cannot be guilty of the crime of obtaining money or property by false pretenses; corporations have been held criminally liable for obtaining, or conspiring to obtain, money by false pretenses.<sup>2</sup>

However, an agent of a corporation obtaining anything of value for the corporation by false pretenses is subject to conviction along with the corporation.<sup>3</sup> A defendant personally engaged in construction fraud by receiving advance payments from customers in the name of the construction company, and thus, the defendant was not shielded by the company from criminal liability; the defendant held himself out to customers as the president and general manager of the company, he was the signatory on the construction company's account and had access to the advance funds submitted by the customers, he directed the customers as to when and how much money was to be advanced, he made numerous promises to customers that were unfulfilled, and he was the customers' main contact at the company.<sup>4</sup>

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#### Footnotes

<sup>1</sup> § 26.

<sup>2</sup> *Com. v. Duddie Ford, Inc.*, 28 Mass. App. Ct. 426, 551 N.E.2d 1211 (1990), *aff'd in part, rev'd in part* on other grounds, 409 Mass. 387, 566 N.E.2d 1119 (1991); *State v. Roche, Inc.*, 2 Neb. App. 445, 511 N.W.2d 195 (1994), judgment *rev'd* on other grounds, 246 Neb. 568, 520 N.W.2d 539 (1994); *Joseph L. Sigretto & Sons v. State*, 127



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N.J.L. 578, 24 A.2d 199 (N.J. Sup. Ct. 1942); State v. Pruitt, 178 W. Va. 147, 358 S.E.2d 231 (1987).

<sup>3</sup> State v. Lang, 106 N.C. App. 695, 417 S.E.2d 808 (1992).

<sup>4</sup> McCary v. Com., 42 Va. App. 119, 590 S.E.2d 110 (2003).  
As to construction fraud, generally, see § 20.

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## 32 Am. Jur. 2d False Pretenses § 8

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### False Pretenses


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### § 8. Corporation or limited liability company as victims of false pretenses

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#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  1, 2

A corporation is a “person” within the meaning of a statute punishing the obtaining of money or property by false pretenses.<sup>1</sup> Statutes sometimes expressly state that the crime may be committed by obtaining a valuable thing from a corporation.<sup>2</sup>

Similarly, a limited liability company is a “person” who may be a victim under the definition of a false pretenses statute.<sup>3</sup>

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#### Footnotes

<sup>1</sup> [U.S. v. Jacobowitz](#), 877 F.2d 162 (2d Cir. 1989); [U.S. v. Briggs](#), 965 F.2d 10 (5th Cir. 1992) (bank was a victim of false pretenses); [State v. Coando](#), 784 P.2d 1228 (Utah Ct. App. 1989), *aff'd*, 858 P.2d 926 (Utah 1992).

<sup>2</sup> [Moore v. State](#), 96 Okla. Crim. 118, 250 P.2d 46 (1952).

<sup>3</sup> [Cater v. State](#), 5 So. 3d 391 (Miss. 2009).

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## 32 Am. Jur. 2d False Pretenses § 9

American Jurisprudence, Second Edition | May 2021 Update

False Pretenses


Lucas Martin, J.D.

### I. In General; Definitions and Distinctions

## § 9. Public bodies and governmental agencies as victims of false pretenses

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  1, 2

The crime of obtaining money or property by false pretenses may, as a matter of both state<sup>1</sup> and federal law, be committed by presenting and attempting to establish a claim known to be false against a government agency.<sup>2</sup>

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### Footnotes

<sup>1</sup> [Britain v. State](#), 533 So. 2d 684 (Ala. Crim. App. 1988); [State v. Robins](#), 34 Conn. App. 694, 643 A.2d 881 (1994), judgment aff'd, 233 Conn. 527, 660 A.2d 738 (1995); [State v. Jones](#), 13 Kan. App. 2d 520, 775 P.2d 183 (1989), decision aff'd, 246 Kan. 180, 787 P.2d 738 (1990); [State v. Skarbinski](#), 2011 ME 65, 21 A.3d 86 (Me. 2011); [State v. Crumley](#), 223 Mont. 224, 725 P.2d 214 (1986); [Terry v. State](#), 397 S.W.3d 823 (Tex. App. Houston 14th Dist. 2013).

<sup>2</sup> §§ [75](#) to [92](#).

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## 32 Am. Jur. 2d False Pretenses II A Refs.

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False Pretenses

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### II. Elements of Offense

#### A. False Representation

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4 to 14

### A.L.R. Library

A.L.R. Index, False Pretenses

A.L.R. Index, Fraud and Deceit

A.L.R. Index, Tricks and Trickery

West's A.L.R. Digest, [False Pretenses](#)  4 to 14

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## 32 Am. Jur. 2d False Pretenses § 10

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False Pretenses

Lucas Martin, J.D.

### II. Elements of Offense


#### A. False Representation

##### 1. In General

## § 10. Requirements for criminal liability for false representation, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4 to 14

The basis for a prosecution for obtaining money or property by false pretenses is a representation of a fact that is untrue,<sup>1</sup> calculated to mislead,<sup>2</sup> and intended to induce the person to whom it is made to part with something of value.<sup>3</sup> The misrepresentation must be a statement of a past event or an existing fact.<sup>4</sup>

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### Footnotes

<sup>1</sup> U.S. v. Bales, 813 F.2d 1289, 22 Fed. R. Evid. Serv. 1273 (4th Cir. 1987); In re Mulligan, 560 B.R. 22 (Bankr. D. Conn. 2016) (applying Connecticut law); McDonald v. State, 586 So. 2d 259 (Ala. Crim. App. 1991); Clark v. State, 308 Ark. 84, 308 Ark. 453, 824 S.W.2d 345 (1992); People v. Warner, 801 P.2d 1187 (Colo. 1990); State v. Robins, 34 Conn. App. 694, 643 A.2d 881 (1994), judgment aff'd, 233 Conn. 527, 660 A.2d 738 (1995); State v. Shiloff, 125 Idaho 104, 867 P.2d 978 (1994); Com. v. Long, 90 Mass. App. Ct. 696, 63 N.E.3d 1123 (2016) (false statement of fact); State v. Phillips, 797 S.E.2d 704 (N.C. Ct. App. 2017) (false and deceptive representation of a fact or event).

<sup>2</sup> In re Mulligan, 560 B.R. 22 (Bankr. D. Conn. 2016) (applying Connecticut law); State v. Ephraim, 28 Conn. App. 306, 610 A.2d 1320 (1992); Com. v. Long, 90 Mass. App. Ct. 696, 63 N.E.3d 1123 (2016) (defendant intended that the person to whom he made the false statement would rely on it); State v. Holanek, 776 S.E.2d 225 (N.C. Ct. App. 2015), review denied, 368 N.C. 429, 778 S.E.2d 95 (2015) and cert. denied, 136 S. Ct. 2493, 195 L. Ed. 2d 824 (2016) (calculated and intended to deceive); State v. Arnold, 719 S.W.2d 543 (Tenn. Crim. App. 1986).

<sup>3</sup> In re Mulligan, 560 B.R. 22 (Bankr. D. Conn. 2016) (applying Connecticut law); State v. Rochette, 25 Conn. App. 298, 594 A.2d 1006 (1991); Com. v. Long, 90 Mass. App. Ct. 696, 63 N.E.3d 1123 (2016); State v. Worden, 115 Or. App. 376, 838 P.2d 640 (1992); State v. Letts, 986 A.2d 1006 (R.I. 2010) (obtain property from another designedly); Bohling v. State, 2017 WY 7, 388 P.3d 502 (Wyo. 2017) (intent to defraud).  
As to knowledge and design of statement, generally, see §§ 25 to 28.

As to acquisition of something of value, see §§ 29 to 41.

As to reliance, see §§ 42 to 45.

- <sup>4</sup> In re Mulligan, 560 B.R. 22 (Bankr. D. Conn. 2016) (applying Connecticut law); Yeager v. State, 500 So. 2d 1260 (Ala. Crim. App. 1986); People v. Hartley, 248 Cal. App. 4th 620, 203 Cal. Rptr. 3d 770 (6th Dist. 2016); People v. Prendergast, 87 P.3d 175 (Colo. App. 2003); Brady v. State, 267 Ga. App. 351, 599 S.E.2d 313 (2004); Kollar v. State, 556 N.E.2d 936 (Ind. Ct. App. 1990); State v. Schultz, 252 Kan. 819, 850 P.2d 818, 33 A.L.R.5th 835 (1993); Henderson v. State, 534 So. 2d 554 (Miss. 1988); Saylor v. Valles, 133 N.M. 432, 2003-NMCA-037, 63 P.3d 1152 (Ct. App. 2002); State v. Phillips, 797 S.E.2d 704 (N.C. Ct. App. 2017); State v. Letts, 986 A.2d 1006 (R.I. 2010); State v. Arnold, 719 S.W.2d 543 (Tenn. Crim. App. 1986); Reid v. Com., 65 Va. App. 745, 781 S.E.2d 373 (2016); State v. Barnes, 177 W. Va. 510, 354 S.E.2d 606 (1987).

## 32 Am. Jur. 2d False Pretenses § 11

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### False Pretenses

Lucas Martin, J.D.

## II. Elements of Offense


### A. False Representation

#### 1. In General

## § 11. Misrepresentation of matter of law as false pretense

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 7(1), 8

Traditionally, a misrepresentation relating to a matter of law could not be the basis of a prosecution for obtaining money or property by false pretenses.<sup>1</sup>

Notwithstanding the traditional view, many modern false pretenses statutes specifically state that a misrepresentation of a matter of law will support a conviction for obtaining money or property by false pretenses.<sup>2</sup>

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### Footnotes

<sup>1</sup> [State v. Comes](#), 245 Iowa 485, 62 N.W.2d 753 (1954); [State v. Vallee](#), 136 Me. 432, 12 A.2d 421 (1940) (overruled in part on other grounds by, [State v. Deschambault](#), 159 Me. 223, 191 A.2d 114 (1963)).

<sup>2</sup> [Com. v. Burnette](#), 875 S.W.2d 865 (Ky. 1994); [State v. O'Connell](#), 726 S.W.2d 742 (Mo. 1987); [State v. Grell](#), 233 Neb. 314, 444 N.W.2d 911 (1989); [State v. Rodgers](#), 230 N.J. Super. 593, 554 A.2d 866 (App. Div. 1989); [State v. Heintze](#), 482 N.W.2d 590 (N.D. 1992); [State v. Worden](#), 115 Or. App. 376, 838 P.2d 640 (1992).

## 32 Am. Jur. 2d False Pretenses § 12

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False Pretenses

Lucas Martin, J.D.

### II. Elements of Offense

#### A. False Representation

##### 1. In General

## § 12. Promissory statement as false pretense

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 7(1), 7(3), 7(5)

#### A.L.R. Library

[Modern status of rule that crime of false pretenses cannot be predicated upon present intention not to comply with promise or statement as to future act, 19 A.L.R.4th 959](#)

Generally, misrepresentations that are promissory in character do not constitute false pretenses.<sup>1</sup> A mere failure to fulfill a promise does not constitute a misrepresentation, as required for conviction for larceny by false pretenses.<sup>2</sup> However, the fact that the defendant made false representations as to future events or promises will not relieve him or her from criminal liability if he or she also made material false representations as to existing or past facts.<sup>3</sup>

However, a promise to perform a future act may constitute a “false pretense.”<sup>4</sup> Some jurisdictions have enacted false pretenses statutes which expressly provide that promising performance which the promisor intends not to perform or knows will not be performed is punishable as a false pretense or deception.<sup>5</sup> One method of establishing theft, in connection with a contractual dispute, is to establish that the defendant had no intention of fulfilling his obligation under the agreement, and his promise to perform was merely a ruse to accomplish theft by deception.<sup>6</sup>

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#### Footnotes

<sup>1</sup> [U.S. v. Stever, 222 U.S. 167, 32 S. Ct. 51, 56 L. Ed. 145 \(1911\); Robinson v. State, 198 Ga. App. 431, 401 S.E.2d 621](#)



(1991); *Gumm v. Heider*, 220 Or. 5, 348 P.2d 455 (1960).

Creating a false impression as to a future event, by a promise of future payment, is not sufficient to support a conviction for theft by deception. *Brady v. State*, 267 Ga. App. 351, 599 S.E.2d 313 (2004).

<sup>2</sup> *Com. v. Occhiuto*, 88 Mass. App. Ct. 489, 38 N.E.3d 783 (2015), review denied, 473 Mass. 1106, 47 N.E.3d 684 (2015).

<sup>3</sup> *Randle v. U.S.*, 113 F.2d 945 (App. D.C. 1940); *State v. Pierson*, 47 Del. 397, 91 A.2d 541 (Super. Ct. 1952); *State v. Handke*, 185 Kan. 38, 340 P.2d 877 (1959); *Com. v. Occhiuto*, 88 Mass. App. Ct. 489, 38 N.E.3d 783 (2015), review denied, 473 Mass. 1106, 47 N.E.3d 684 (2015); *State v. Arnold*, 719 S.W.2d 543 (Tenn. Crim. App. 1986).

<sup>4</sup> *State v. Letts*, 986 A.2d 1006 (R.I. 2010).

<sup>5</sup> *State v. Walker*, 192 So. 3d 426 (Ala. Crim. App. 2015); *McGuinness v. State*, 120 So. 3d 175 (Fla. 2d DCA 2013); *Schmitt v. State*, 634 N.E.2d 71 (Ind. Ct. App. 1994); *State v. Thorpe*, 51 Wash. App. 582, 754 P.2d 1050 (Div. 1 1988); *State v. Moore*, 166 W. Va. 97, 273 S.E.2d 821, 19 A.L.R.4th 945 (1980).

<sup>6</sup> *Higginbotham v. State*, 356 S.W.3d 584 (Tex. App. Texarkana 2011), petition for discretionary review refused, (Feb. 29, 2012).

A defendant's failure to fulfill a contract is not proof of a specific intent to defraud, as could support a theft conviction; thus, where the defendant's actions between the time of the contract and the arrest manifest an intention to perform the contract, a conviction for theft should not stand, but the mere assertion that the defendant has not gotten around to performing the contract will not negate the intent to permanently deprive. *People v. Oglesby*, 2016 IL App (1st) 141477, 410 Ill. Dec. 103, 69 N.E.3d 328 (App. Ct. 1st Dist. 2016).

## 32 Am. Jur. 2d False Pretenses § 13

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False Pretenses

Lucas Martin, J.D.

### II. Elements of Offense

#### A. False Representation

##### 1. In General

## § 13. Statement of opinion as false pretense

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 7(1), 7(3)

The mere expression of an opinion does not render the person expressing it liable to a prosecution for obtaining money or property by false pretenses,<sup>1</sup> especially where the opinion expressed is on a matter concerning which a difference of opinion is likely to arise.<sup>2</sup> But where a person knows an opinion is erroneous, the matter is as to such person not an opinion, but a subsisting fact, and one cannot be allowed to escape the consequences of making a statement contrary to what one knows to be the fact on the theory that such statement concerns a matter of opinion.<sup>3</sup> Where an expression of opinion is mingled with a misrepresentation of fact, the opinion element does not eliminate the criminality of the misrepresentation of fact.<sup>4</sup>

### Practice Tip:

The question whether a representation is an expression of opinion or a statement of fact is regarded as one for the trier of facts.<sup>5</sup>

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### Footnotes

<sup>1</sup> [Whatley v. State](#), 249 Ala. 355, 31 So. 2d 664, 174 A.L.R. 169 (1947); [State v. Comes](#), 245 Iowa 485, 62 N.W.2d 753 (1954); [People v. Wilde](#), 42 Mich. App. 514, 202 N.W.2d 542 (1972).

<sup>2</sup> [Herrick v. State](#), 159 Me. 499, 196 A.2d 101, 99 A.L.R.2d 918 (1963).

<sup>3</sup> Whatley v. State, 249 Ala. 355, 31 So. 2d 664, 174 A.L.R. 169 (1947); Herrick v. State, 159 Me. 499, 196 A.2d 101, 99 A.L.R.2d 918 (1963); Com. v. Parker, 387 Pa. Super. 415, 564 A.2d 246 (1989).

<sup>4</sup> State v. Smith, 324 S.W.2d 702 (Mo. 1959); Dwoskin v. State, 161 Neb. 793, 74 N.W.2d 847 (1956).

<sup>5</sup> People v. Schwartz, 222 Ill. App. 3d 1041, 165 Ill. Dec. 439, 584 N.E.2d 873 (2d Dist. 1991); Herrick v. State, 159 Me. 499, 196 A.2d 101, 99 A.L.R.2d 918 (1963).

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## 32 Am. Jur. 2d False Pretenses § 14

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### False Pretenses

Lucas Martin, J.D.

## II. Elements of Offense

### A. False Representation

#### 1. In General

## § 14. Statement of opinion as false pretense—As to condition, value, or quality; puffing

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 7(1), 7(3)

Some modern false pretenses statutes define deception as, among other things, creating or confirming a false impression as to value.<sup>1</sup>

However, a misrepresentation of value may involve merely an inflated opinion as to the value of services.<sup>2</sup> “Puffing statements” and “trade talk” generally are not regarded as criminally false pretenses.<sup>3</sup>

Many modern false pretenses statutes provide that the term “deceive” does not include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed.<sup>4</sup>

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### Footnotes

<sup>1</sup> [Com. v. Burnette](#), 875 S.W.2d 865 (Ky. 1994); [State v. O’Connell](#), 726 S.W.2d 742 (Mo. 1987).

<sup>2</sup> [McElroy v. State](#), 571 So. 2d 353 (Ala. Crim. App. 1990) (deception held not to include exaggerated commendation of wares or services unlikely to deceive ordinary persons).

<sup>3</sup> [McElroy v. State](#), 571 So. 2d 353 (Ala. Crim. App. 1990); [State v. Roche, Inc.](#), 2 Neb. App. 445, 511 N.W.2d 195 (1994), judgment rev’d on other grounds, 246 Neb. 568, 520 N.W.2d 539 (1994).

<sup>4</sup> [McElroy v. State](#), 571 So. 2d 353 (Ala. Crim. App. 1990); [People v. Moran](#), 260 Ill. App. 3d 154, 198 Ill. Dec. 504, 632 N.E.2d 1115 (2d Dist. 1994); [Com. v. Burnette](#), 875 S.W.2d 865 (Ky. 1994); [State v. Hollingsworth](#), 817 S.W.2d 479 (Mo. Ct. App. W.D. 1991); [State v. Reed](#), 228 Neb. 645, 423 N.W.2d 777 (1988); [State v. Rodgers](#), 230 N.J. Super. 593, 554 A.2d 866 (App. Div. 1989); [State v. Hurst](#), 507 N.W.2d 918 (S.D. 1993).

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## 32 Am. Jur. 2d False Pretenses § 15

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False Pretenses

Lucas Martin, J.D.

### II. Elements of Offense

#### A. False Representation

##### 1. In General

## § 15. Manner of expressing false representation; acts or conduct; silence and concealment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 7(1), 7(2), 8

The offense of obtaining money or property by false pretenses may be perpetrated by the use of words alone.<sup>1</sup> However, a false pretense may be made by implication as well as expressly.<sup>2</sup> Words, written or spoken, are not essential to a false representation such as will subject one to punishment for obtaining money or property by false pretenses; acts or conduct may constitute a false representation.<sup>3</sup> Under some circumstances a prosecution for obtaining money by false pretenses may be based on silence<sup>4</sup> or concealment.<sup>5</sup>

If the victim's property is obtained by the defendant intentionally preventing the victim from acquiring information that would affect the victim's judgment about a transaction, then there has been a theft by deception, even if the victim willingly complied in giving up the property, because he or she was deceived into doing so.<sup>6</sup>

#### Practice Tip:

Whether certain acts amount to a false representation is usually a question for the trier of facts.<sup>7</sup>

§ 15. Manner of expressing false representation; acts or..., 32 Am. Jur. 2d False...

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- <sup>1</sup> U.S. v. Nathan, 816 F.2d 230, 22 Fed. R. Evid. Serv. 1433 (6th Cir. 1987); *Salter v. State*, 527 So. 2d 791 (Ala. Crim. App. 1988); *People v. Hartley*, 248 Cal. App. 4th 620, 203 Cal. Rptr. 3d 770 (6th Dist. 2016); *People v. Warner*, 801 P.2d 1187 (Colo. 1990); *State v. Robins*, 34 Conn. App. 694, 643 A.2d 881 (1994), judgment *aff'd*, 233 Conn. 527, 660 A.2d 738 (1995); *Hale v. Burkhardt*, 104 Nev. 632, 764 P.2d 866 (1988).
- <sup>2</sup> *Gilbert v. Feld*, 842 F. Supp. 803 (E.D. Pa. 1993); *Clark v. State*, 308 Ark. 84, 308 Ark. 453, 824 S.W.2d 345 (1992); *State v. Carcare*, 75 Conn. App. 756, 818 A.2d 53 (2003); *State v. Schultz*, 252 Kan. 819, 850 P.2d 818, 33 A.L.R.5th 835 (1993); *Com. v. Occhiuto*, 88 Mass. App. Ct. 489, 38 N.E.3d 783 (2015), review *denied*, 473 Mass. 1106, 47 N.E.3d 684 (2015).
- <sup>3</sup> *Gilbert v. Feld*, 842 F. Supp. 803 (E.D. Pa. 1993); *Lipham v. State*, 616 So. 2d 396 (Ala. Crim. App. 1993); *Walsh v. State*, 758 P.2d 124 (Alaska Ct. App. 1988); *People v. Hartley*, 248 Cal. App. 4th 620, 203 Cal. Rptr. 3d 770 (6th Dist. 2016); *People v. Pipkin*, 762 P.2d 736 (Colo. App. 1988); *Com. v. Occhiuto*, 88 Mass. App. Ct. 489, 38 N.E.3d 783 (2015), review *denied*, 473 Mass. 1106, 47 N.E.3d 684 (2015); *People v. Jory*, 443 Mich. 403, 505 N.W.2d 228 (1993); *State v. Ulvestad*, 414 N.W.2d 737 (Minn. Ct. App. 1987); *Lee v. State*, 244 Miss. 813, 146 So. 2d 736 (1962); *Hale v. Burkhardt*, 104 Nev. 632, 764 P.2d 866 (1988); *State v. Pendergraft*, 238 N.C. App. 516, 767 S.E.2d 674 (2014), *aff'd*, 368 N.C. 314, 776 S.E.2d 679 (2015); *Broadway v. State*, 1991 OK CR 113, 818 P.2d 1253 (Okla. Crim. App. 1991).
- <sup>4</sup> *People v. Jory*, 443 Mich. 403, 505 N.W.2d 228 (1993); *Ballaine v. District Court of First Judicial District for Box Elder County*, 107 Utah 247, 153 P.2d 265 (1944).
- <sup>5</sup> *Muhammed v. State*, 27 Ark. App. 188, 769 S.W.2d 33 (1989); *People v. Jory*, 443 Mich. 403, 505 N.W.2d 228 (1993); *Lee v. State*, 244 Miss. 813, 146 So. 2d 736 (1962).
- <sup>6</sup> *Commonwealth v. Young*, 487 S.W.3d 430 (Ky. 2015), as modified, (May 5, 2016).
- <sup>7</sup> *People v. Schwartz*, 222 Ill. App. 3d 1041, 165 Ill. Dec. 439, 584 N.E.2d 873 (2d Dist. 1991).

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## 32 Am. Jur. 2d False Pretenses § 16

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### False Pretenses

Lucas Martin, J.D.

#### II. Elements of Offense


##### A. False Representation

###### 1. In General

### § 16. Manner of expressing false representation; acts or conduct; silence and concealment—Use of false token

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 6, 7(1)

Statutes making it a crime to obtain money or property by false pretenses sometimes include a provision making it a crime to obtain money or property by the use of false tokens.<sup>1</sup>

A federal statute makes it a crime to fraudulently or wrongfully affix or impress the seal of any department or agency of the United States, to or upon any certificate, instrument, commission, document, or paper or with knowledge of its fraudulent character, with wrongful or fraudulent intent, use, buy, procure, sell, or transfer to another any such certificate, instrument, commission, document, or paper, to which or upon which the seal has been so fraudulently affixed or impressed.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Com. v. Occhiuto](#), 88 Mass. App. Ct. 489, 38 N.E.3d 783 (2015), review denied, 473 Mass. 1106, 47 N.E.3d 684 (2015); [Sheriff, Clark County v. Crockett](#), 102 Nev. 359, 724 P.2d 203 (1986); [State v. Mann](#), 244 N.J. Super. 622, 583 A.2d 372 (App. Div. 1990).

<sup>2</sup> [18 U.S.C.A. § 1017](#) and further providing that such person must be fined or imprisoned, or both.



## 32 Am. Jur. 2d False Pretenses § 17

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False Pretenses

Lucas Martin, J.D.

### II. Elements of Offense

#### A. False Representation

##### 1. In General

## § 17. Requirements as to time and extent of falsity for false pretenses

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 7(1), 8

Traditionally, to sustain a conviction for obtaining property by false pretenses it was essential that the pretenses were actually false<sup>1</sup> at the time the victim parted with something of value.<sup>2</sup> However, it is possible to deceive with statements which are literally true; totality of falseness of impression is what counts, not any particular misrepresentation.<sup>3</sup>

An innocent or negligent misrepresentation is insufficient for a conviction for false pretenses; the defendant must intend to defraud.<sup>4</sup>

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#### Footnotes

<sup>1</sup> State v. Matthews, 44 Kan. 596, 25 P. 36 (1890); Com. v. Beckett, 119 Ky. 817, 27 Ky. L. Rptr. 265, 84 S.W. 758 (1905); Doxey v. State, 47 Tex. Crim. 503, 84 S.W. 1061 (1905).

<sup>2</sup> State v. McWilliams, 331 S.W.2d 610 (Mo. 1960).

<sup>3</sup> State v. Rodgers, 230 N.J. Super. 593, 554 A.2d 866 (App. Div. 1989).

<sup>4</sup> State v. Letts, 986 A.2d 1006 (R.I. 2010).

## 32 Am. Jur. 2d False Pretenses § 18

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False Pretenses

Lucas Martin, J.D.

### II. Elements of Offense


#### A. False Representation

#### 2. Particular Subjects of Representations

## § 18. Material fact or subject as false representation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 7(1), 11

A criminally false representation or pretense may relate to any material fact or subject,<sup>1</sup> including one's intention or state of mind.<sup>2</sup>

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### Footnotes

<sup>1</sup> [People v. Ashley](#), 42 Cal. 2d 246, 267 P.2d 271 (1954).

<sup>2</sup> [Com. v. Burnette](#), 875 S.W.2d 865 (Ky. 1994); [State v. Grell](#), 233 Neb. 314, 444 N.W.2d 911 (1989); [State v. Fyffe](#), 67 Ohio App. 3d 608, 588 N.E.2d 137 (10th Dist. Franklin County 1990); [State v. Worden](#), 115 Or. App. 376, 838 P.2d 640 (1992); [Com. v. Graham](#), 528 Pa. 250, 596 A.2d 1117 (1991).

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## 32 Am. Jur. 2d False Pretenses § 19

American Jurisprudence, Second Edition | May 2021 Update

### False Pretenses

Lucas Martin, J.D.

#### II. Elements of Offense


##### A. False Representation

##### 2. Particular Subjects of Representations

### § 19. Fraud in connection with social security number as false pretense

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 6, 7(1)

False representation of a fake, nonexistent, social security number may constitute the offense of false pretenses.<sup>1</sup>

#### Observation:

Sufficient evidence established that the defendant intended to deceive when he used a social security number to open bank accounts, as required to support the defendant's conviction of using the social security number of another; before opening the accounts the defendant had been told by the Social Security Administration (SSA) that the card he was using was invalid because the number had not been issued in his name, the driver's license examination station told the defendant his name did not match that associated with the number on the card, the card had been confiscated by the SSA before the defendant opened the bank accounts, the defendant told at least one person that the card belonged to his father, and the defendant had stated that law enforcement did not want him to use the card and number.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [U.S. v. Bales, 813 F.2d 1289, 22 Fed. R. Evid. Serv. 1273 \(4th Cir. 1987\).](#)

<sup>2</sup> [U.S. v. Sirbel, 427 F.3d 1155 \(8th Cir. 2005\).](#)

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## 32 Am. Jur. 2d False Pretenses § 20

American Jurisprudence, Second Edition | May 2021 Update

False Pretenses

Lucas Martin, J.D.

### II. Elements of Offense

#### A. False Representation

##### 2. Particular Subjects of Representations

## § 20. Construction fraud as false pretense

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 7(1), 11

#### A.L.R. Library

[Criminal responsibility for fraud or false pretenses in connection with home repairs or installations, 99 A.L.R.2d 925](#)

Under some statutes, if a person, upon a promise to perform construction on real property, receives an advance of money with fraudulent intent, and fails or refuses to perform and fails to repay the advance within a prescribed number of days following a certified mail request therefor, he or she may be guilty of obtaining money by false pretenses.<sup>1</sup> Under a construction fraud statute, fraudulent intent must exist at the time that the defendant procured the advance.<sup>2</sup> A contractor accused of theft may not be convicted of that offense on the theory that he acquired a down payment from his customer by deception if there is no reason to doubt from the evidence that he had every expectation at the time that the money changed hands of fulfilling his contractual obligation; at the time of the down payment, the customer paid voluntarily, and the accused neither intended nor knew he would not perform.<sup>3</sup>

Additionally, a contractor may be found guilty of theft if, at some point after the formation of the contract, he formulates the requisite intent to deprive and appropriates additional property by deception; that is, he induces his customer to make further payment on the contract while no longer intending to perform, or at least knowing that he will not.<sup>4</sup>

#### Practice Tip:

False statements made to the victim to induce him or her to enter the contract are persuasive evidence of the requisite fraudulent

intent.<sup>5</sup> However, the theft by false pretenses defendant's intent to defraud must be proved by something more than mere proof of nonperformance or actual falsity; this prevents ordinary commercial defaults from becoming the subject of criminal prosecution.<sup>6</sup>

Construction fraud can occur despite the fact that a builder or contractor begins to perform on the contract.<sup>7</sup> The fact that partial or even substantial work has been done on a contract will not invariably negate either the intent to deprive or the deception necessary to establish the unlawfulness of the initial appropriation; a contractor still may be convicted of theft under circumstances beyond the mere "failure to perform the promise in issue" in which a rational fact finder could readily conclude that he never intended, even at the outset, to perform fully or satisfactorily on the contract, and always harbored the requisite intent or knowledge to deceive his customer and thereby deprive him of the value of at least a substantial portion of the property thus unlawfully appropriated.<sup>8</sup>

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#### Footnotes

- <sup>1</sup> [Jimenez v. Com.](#), 241 Va. 244, 402 S.E.2d 678 (1991).  
Construction fraud statute, under which a contractor who received an advance to perform construction could be deemed guilty of larceny for failing to perform the work and failing to return the advance with 15 days of "a request to do so" by certified mail, required proof of an unqualified demand to return all or part of the original advance; the statute did not provide for criminal liability based on the failure to satisfy other requests, such as partial performance under a contract. [Bowman v. Com.](#), 290 Va. 492, 777 S.E.2d 851 (2015).
- <sup>2</sup> [Bowman v. Com.](#), 290 Va. 492, 777 S.E.2d 851 (2015).
- <sup>3</sup> [Taylor v. State](#), 450 S.W.3d 528 (Tex. Crim. App. 2014).
- <sup>4</sup> [Taylor v. State](#), 450 S.W.3d 528 (Tex. Crim. App. 2014).
- <sup>5</sup> [Klink v. Com.](#), 12 Va. App. 815, 407 S.E.2d 5 (1991).
- <sup>6</sup> [People v. Hartley](#), 248 Cal. App. 4th 620, 203 Cal. Rptr. 3d 770 (6th Dist. 2016).
- <sup>7</sup> [McCary v. Com.](#), 42 Va. App. 119, 590 S.E.2d 110 (2003).
- <sup>8</sup> [Taylor v. State](#), 450 S.W.3d 528 (Tex. Crim. App. 2014).

## 32 Am. Jur. 2d False Pretenses § 21

American Jurisprudence, Second Edition | May 2021 Update

False Pretenses

Lucas Martin, J.D.

### II. Elements of Offense


#### A. False Representation

##### 2. Particular Subjects of Representations

## § 21. False insurance claim as false pretense

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 7(1)

One who, with fraudulent intent, makes a false insurance claim for reimbursement for property purported to be stolen<sup>1</sup> or for reimbursement for his or her house after he or she has it burned down<sup>2</sup> or for motor vehicle insurance claims, may be guilty of the offense of false pretenses.<sup>3</sup>

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### Footnotes

<sup>1</sup> [State v. Grubbs](#), 657 S.W.2d 380 (Mo. Ct. App. E.D. 1983); [State v. Henshaw](#), 557 A.2d 1204 (R.I. 1989).

<sup>2</sup> [State v. Houck](#), 240 Kan. 130, 727 P.2d 460 (1986).

<sup>3</sup> [Com. v. Hyde](#), 88 Mass. App. Ct. 761, 42 N.E.3d 1171 (2015), review denied, 473 Mass. 1111, 48 N.E.3d 464 (2016) and review denied, 473 Mass. 1111, 48 N.E.3d 464 (2016).

## 32 Am. Jur. 2d False Pretenses § 22

American Jurisprudence, Second Edition | May 2021 Update

### False Pretenses

Lucas Martin, J.D.

#### II. Elements of Offense


##### A. False Representation

##### 2. Particular Subjects of Representations

### § 22. False insurance claim as false pretense—Health care fraud

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 7(1)

Under federal statute, whoever, in any matter involving a health care benefit program, knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact; or makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, in connection with the delivery of or payment for health care benefits, items, or services, must be fined or imprisoned, or both.<sup>1</sup>

Additionally, whoever willfully executes, or attempts to execute, a scheme or artifice to defraud any health care benefit program; or to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items, or services, must be fined or imprisoned, or both.<sup>2</sup> With respect to such violations, a person need not have actual knowledge of this statute or specific intent to commit a violation of this statute.<sup>3</sup>

#### Practice Tip:

The government is not required to seek a remedy through the administrative appeals process before prosecuting a defendant for alleged health care fraud and related conspiracy based on the purported submission of Medicare cost reports containing false or misleading information.<sup>4</sup>



## CUMULATIVE SUPPLEMENT

### Cases:

Evidence supported conviction of defendant physician for conspiracy to violate the Medicare anti-kickback statute; owner of home health care agency testified that defendant told her that if she increased the salary for defendant's non-physician wife, defendant would send more patients to agency in order to substantiate the increase in wife's salary. [18 U.S.C.A. § 371](#); Social Security Act § 1128B(b)(1, 2), [42 U.S.C.A. § 1320a-7b\(b\)\(1, 2\)](#). [United States v. Barnes](#), 979 F.3d 283 (5th Cir. 2020).

Patients' testimony that they did not have the symptoms for which medical tests were conducted supported physicians' convictions for health care fraud, relating to Medicare reimbursement claims. [18 U.S.C.A. § 1347](#). [United States v. Martinez](#), 921 F.3d 452 (5th Cir. 2019).

Evidence that defendant entered into an agreement with the owner of a home health care company to commit healthcare fraud was sufficient to support conviction for conspiracy to commit health care fraud; defendant repeatedly worked with staff from the company to find and enroll new Medicare patients, in doing so, he dressed and acted towards potential patients as if he were a physician capable of certifying patients for Medicare services, directed a nurse to enroll patients, and assigned diagnoses for the new patients, he also discussed payment with a patient recruiter, sometimes paid new or re-enrolling patients, and sometimes provided money for others to pay the enrollment kickbacks, and after he told the company owner that he could bring in 300 Medicare patients if the owner cooperated, the owner responded that such a large number of enrollees would be profitable for her. [18 U.S.C.A. § 1349](#). [United States v. Duruji](#), 777 Fed. Appx. 717 (5th Cir. 2019).

Evidence that defendant, who worked for company that sold durable medical equipment, had criminal intent to commit health care fraud and receive kickbacks was sufficient to support her convictions for health care fraud and receipt of health care kickbacks; while defendant asserted that her demeanor during interview with investigators indicated she did not want to defraud Medicare, evidence indicated defendant was repeatedly exposed to fraud, since defendant drove patients who were fully ambulatory to physician, then referred them for power wheelchairs, and defendant knew physician had not examined patients, but merely dropped off paperwork for referrals for durable medical equipment. [18 U.S.C.A. §§ 2, 1347](#); Social Security Act § 1128, [42 U.S.C.A. §§ 1320a-7\(b\)\(1\)\(A\), 1320a-7\(b\)\(2\)\(A\)](#). [United States v. Thompson](#), 761 Fed. Appx. 283 (5th Cir. 2019).

Sufficient evidence supported conviction for healthcare fraud relating to defendant's transactions with individual customers of durable medical equipment (DME) company; defendant used false pretenses or representations to artificially increase her sales of DMEs and therefore increase her sales commissions, three individuals testified that defendant sold them power wheelchairs that they did not need and rarely used, each customer's paperwork stated that nurse practitioner prescribed their wheelchair, but did not examine any of the patients in person, and one customer testified that defendant purchased him a cane to give false impression that he was struggling walking. [18 U.S.C.A. § 1347\(a\)](#). [United States v. Bailey](#), 973 F.3d 548, 113 Fed. R. Evid. Serv. 708 (6th Cir. 2020).

## [END OF SUPPLEMENT]

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### Footnotes

<sup>1</sup> [18 U.S.C.A. § 1035\(a\)](#).  
Evidence sufficiently established that the defendant and those under his supervision made false statements to Medicare and a health insurance company that patients needed ambulance transportation because they were bedridden, as required to support his convictions of conspiracy to commit health care fraud, health care fraud, and making false statements for payment by a health care benefit program; video, photographic, and testimonial evidence illustrated that such patients were able to stand, walk, drive, shop, garden, and perform manual labor. [U.S. v. Louthian](#), 756 F.3d 295 (4th Cir. 2014).

<sup>2</sup> [18 U.S.C.A. § 1347\(a\)](#), further providing for enhanced penalties for serious bodily injury or death.

Jury's verdict, in convicting defendant of health care fraud and money laundering, determining that Medicare reimbursed defendant's healthcare company for expensive power wheelchairs even though beneficiaries only received substantially cheaper motorized scooters, was supported by sufficient evidence including defendant's fraudulent efforts such as "recruiting" beneficiaries, deposits of significant funds into company's checking account that were withdrawn as untraceable cash, and defendant's wire transfers of more than \$10,000 based on funds company had fraudulently received from Medicare for wheelchairs. [U.S. v. Igbokwe](#), 518 F.3d 550 (8th Cir. 2008). Government demonstrated materially false or fraudulent representations or omissions, a scheme or artifice to defraud, and the requisite intent to convict defendant physician of various counts of defrauding a health care benefit program. [U.S. v. Boesen](#), 473 F. Supp. 2d 932 (S.D. Iowa 2007), *aff'd* in part, 541 F.3d 838 (8th Cir. 2008).

<sup>3</sup> [18 U.S.C.A. § 1347\(b\)](#).

<sup>4</sup> [U.S. v. Seibert](#), 403 F. Supp. 2d 904 (S.D. Iowa 2005).

## 32 Am. Jur. 2d False Pretenses § 23

American Jurisprudence, Second Edition | May 2021 Update

False Pretenses

Lucas Martin, J.D.

### II. Elements of Offense

#### A. False Representation

##### 2. Particular Subjects of Representations

## § 23. Misrepresentation as to title or ownership as false pretense

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 7(1), 8, 12

A conviction of obtaining money by false pretenses may be based on a misrepresentation with respect to the title to property.<sup>1</sup> A false representation that the defendant was the owner of property, either real or personal, may be the basis for a conviction of obtaining money by false pretenses.<sup>2</sup> One cannot be convicted of obtaining money or property by false pretenses on the basis of a representation of ownership where at the time the representation is made the person making it has an equitable interest in the property, such as an enforceable contract to purchase or an option to buy.<sup>3</sup>

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### Footnotes

<sup>1</sup> [Dwoskin v. State](#), 161 Neb. 793, 74 N.W.2d 847 (1956); [State v. Jeffcoat](#), 279 S.C. 167, 303 S.E.2d 855 (1983).

<sup>2</sup> [People v. Andary](#), 120 Cal. App. 2d 675, 261 P.2d 791 (2d Dist. 1953).

<sup>3</sup> [Burroughs v. State](#), 21 Md. App. 648, 320 A.2d 587 (1974).

## 32 Am. Jur. 2d False Pretenses § 24

American Jurisprudence, Second Edition | May 2021 Update

False Pretenses

Lucas Martin, J.D.

### II. Elements of Offense


#### A. False Representation

##### 2. Particular Subjects of Representations

## § 24. Misrepresentation as to existence or amount of encumbrances as false pretense

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 7(4)

An intentionally false statement with respect to freedom of property from encumbrances,<sup>1</sup> or as to the amount of an encumbrance on property offered as security for a loan or credit, may be the basis of a prosecution for obtaining money or property by false pretenses.<sup>2</sup>

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### Footnotes

<sup>1</sup> [People v. Jory](#), 443 Mich. 403, 505 N.W.2d 228 (1993); [State v. Heintze](#), 482 N.W.2d 590 (N.D. 1992); [State v. Jeffcoat](#), 279 S.C. 167, 303 S.E.2d 855 (1983).

<sup>2</sup> [Nelson v. U.S.](#), 227 F.2d 21, 53 A.L.R.2d 1206 (D.C. Cir. 1955); [State v. Rodgers](#), 230 N.J. Super. 593, 554 A.2d 866 (App. Div. 1989).

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## 32 Am. Jur. 2d False Pretenses II B Refs.

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False Pretenses

Lucas Martin, J.D.

II. Elements of Offense

B. Knowledge and Design

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#) 🔑 4, 5, 8

#### A.L.R. Library

A.L.R. Index, False Pretenses

A.L.R. Index, Fraud and Deceit

A.L.R. Index, Tricks and Trickery

West's A.L.R. Digest, [False Pretenses](#) 🔑 4, 5, 8

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## 32 Am. Jur. 2d False Pretenses § 25

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### False Pretenses

Lucas Martin, J.D.

#### II. Elements of Offense

##### B. Knowledge and Design

### § 25. Necessity of knowledge of falsity of representation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 8

To be guilty of the offense of obtaining money or property by false pretenses, the accused must have had knowledge of the falsity of the representations or pretenses<sup>1</sup> at the time such representations or pretenses were made.<sup>2</sup> One is not guilty of a crime where, although he or she obtained money by false representation, he or she acted under a misapprehension and believed the representation to be true.<sup>3</sup>

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#### Footnotes

<sup>1</sup> In re Mulligan, 560 B.R. 22 (Bankr. D. Conn. 2016) (applying Connecticut law); Ex parte Oliver, 518 So. 2d 705 (Ala. 1987); Clark v. State, 308 Ark. 84, 308 Ark. 453, 824 S.W.2d 345 (1992); People v. Stewart, 739 P.2d 854 (Colo. 1987); State v. Thompson, 305 Conn. 806, 48 A.3d 640 (2012); State v. Schultz, 252 Kan. 819, 850 P.2d 818, 33 A.L.R.5th 835 (1993); State v. Andrus, 617 So. 2d 1334 (La. Ct. App. 3d Cir. 1993); State v. Murray, 604 A.2d 903 (Me. 1992); Com. v. Long, 90 Mass. App. Ct. 696, 63 N.E.3d 1123 (2016); Allred v. State, 605 So. 2d 758 (Miss. 1992); State v. Taylor, 229 Mont. 138, 745 P.2d 337 (1987); Washington v. State, 1986 OK CR 176, 729 P.2d 509 (Okla. Crim. App. 1986); State v. Coando, 784 P.2d 1228 (Utah Ct. App. 1989), *aff'd*, 858 P.2d 926 (Utah 1992); Bray v. Com., 9 Va. App. 417, 388 S.E.2d 837 (1990); Bohling v. State, 2017 WY 7, 388 P.3d 502 (Wyo. 2017).

<sup>2</sup> State v. Rochette, 25 Conn. App. 298, 594 A.2d 1006 (1991); State v. Bond, 584 So. 2d 1212 (La. Ct. App. 2d Cir. 1991); State v. Pruitt, 178 W. Va. 147, 358 S.E.2d 231 (1987).

<sup>3</sup> Ex parte Wood, 564 So. 2d 860 (Ala. 1990); People v. Marsh, 58 Cal. 2d 732, 26 Cal. Rptr. 300, 376 P.2d 300 (1962).

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## 32 Am. Jur. 2d False Pretenses § 26

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### False Pretenses

Lucas Martin, J.D.


#### II. Elements of Offense

##### B. Knowledge and Design

### § 26. Intent to defraud

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 5

To sustain a charge of obtaining property or money by false pretenses, it is essential to show a fraudulent intent.<sup>1</sup> Such fraudulent intent must exist at the time the misrepresentation was made.<sup>2</sup> The element of intent is often set forth in a false pretenses statute.<sup>3</sup>

The intent required to sustain a conviction is an intent to induce another, by means of false representations, to part with his or her property.<sup>4</sup> The element of intent in a scheme to defraud requires a willful act by the defendant with the specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another.<sup>5</sup> Token acts of performance of an agreement may not be enough to preclude or negate a finding of intent on the part of the defendant to deprive the victim of his or her property.<sup>6</sup>

The accused who had the requisite fraudulent intent may be guilty of the crime of obtaining money or property by false pretenses even if he or she intends to repay the money or restore the property,<sup>7</sup> or actually does repay the money or restore the property,<sup>8</sup> or if the victim later tries to condone and excuse the crime.<sup>9</sup>

Although fraudulent intent may be proven by circumstantial evidence,<sup>10</sup> it must be proved by something more than mere falsity of representation, since misrepresentation of facts made innocently or inadvertently cannot form the basis of a prosecution for obtaining property by false pretenses.<sup>11</sup> Finally, the intent not to perform a promise generally will not be inferred from the fact alone that the defendant did not subsequently perform the promise.<sup>12</sup>

#### Practice Tip:

The intent of the accused is a question for the jury.<sup>13</sup>



Footnotes

- <sup>1</sup> In re Mulligan, 560 B.R. 22 (Bankr. D. Conn. 2016) (applying Connecticut law); Ex parte Stinson, 631 So. 2d 831 (Ala. 1992); Clark v. State, 308 Ark. 84, 308 Ark. 453, 824 S.W.2d 345 (1992); People v. Hartley, 248 Cal. App. 4th 620, 203 Cal. Rptr. 3d 770 (6th Dist. 2016); State v. Rochette, 25 Conn. App. 298, 594 A.2d 1006 (1991); People v. Kotlarz, 193 Ill. 2d 272, 250 Ill. Dec. 437, 738 N.E.2d 906 (2000); Schmitt v. State, 634 N.E.2d 71 (Ind. Ct. App. 1994); State v. Maxon, 32 Kan. App. 2d 67, 79 P.3d 202 (2003); Com. v. Burnette, 875 S.W.2d 865 (Ky. 1994); State v. Andrus, 617 So. 2d 1334 (La. Ct. App. 3d Cir. 1993); Com. v. Long, 90 Mass. App. Ct. 696, 63 N.E.3d 1123 (2016); Mississippi State Bd. of Nursing v. Wilson, 624 So. 2d 485 (Miss. 1993); Schertz v. State, 109 Nev. 377, 849 P.2d 1058 (1993); State v. Sharon, 136 N.H. 764, 622 A.2d 840 (1993); State v. Holanek, 776 S.E.2d 225 (N.C. Ct. App. 2015), review denied, 368 N.C. 429, 778 S.E.2d 95 (2015) and cert. denied, 136 S. Ct. 2493, 195 L. Ed. 2d 824 (2016); State v. Letts, 986 A.2d 1006 (R.I. 2010); State v. Agosta, 173 Vt. 97, 787 A.2d 1252 (2001); Swinson v. Com., 16 Va. App. 923, 434 S.E.2d 348 (1993); State v. Smith, 115 Wash. 2d 434, 798 P.2d 1146 (1990); State v. Steffes, 2013 WI 53, 347 Wis. 2d 683, 832 N.W.2d 101 (2013).
- <sup>2</sup> Walsh v. State, 758 P.2d 124 (Alaska Ct. App. 1988); Kollar v. State, 556 N.E.2d 936 (Ind. Ct. App. 1990); Com. v. Long, 90 Mass. App. Ct. 696, 63 N.E.3d 1123 (2016); Austin v. Com., 60 Va. App. 60, 723 S.E.2d 633 (2012).  
The only relevant time period with respect to intent to defraud, for purposes of false pretenses, is when the victim is induced to part with his money or property. State v. Letts, 986 A.2d 1006 (R.I. 2010).
- <sup>3</sup> U.S. v. Nivica, 887 F.2d 1110, 29 Fed. R. Evid. Serv. 236 (1st Cir. 1989); In re Mulligan, 560 B.R. 22 (Bankr. D. Conn. 2016) (applying Connecticut law); Ex parte Stinson, 631 So. 2d 831 (Ala. 1992); Clark v. State, 308 Ark. 84, 308 Ark. 453, 824 S.W.2d 345 (1992); People v. Hartley, 248 Cal. App. 4th 620, 203 Cal. Rptr. 3d 770 (6th Dist. 2016); People v. Stewart, 739 P.2d 854 (Colo. 1987); State v. Rochette, 25 Conn. App. 298, 594 A.2d 1006 (1991); Com. v. Long, 90 Mass. App. Ct. 696, 63 N.E.3d 1123 (2016); State v. Letts, 986 A.2d 1006 (R.I. 2010); State v. Heftel, 513 N.W.2d 397 (S.D. 1994).
- <sup>4</sup> People v. Stewart, 739 P.2d 854 (Colo. 1987); State v. Rochette, 25 Conn. App. 298, 594 A.2d 1006 (1991).
- <sup>5</sup> U.S. v. Daniel, 749 F.3d 608 (7th Cir. 2014).
- <sup>6</sup> People v. Veasey, 251 Ill. App. 3d 589, 190 Ill. Dec. 929, 622 N.E.2d 1246 (2d Dist. 1993); Rader v. Com., 15 Va. App. 325, 423 S.E.2d 207 (1992).
- <sup>7</sup> Com. v. Stovall, 22 Mass. App. Ct. 737, 498 N.E.2d 126 (1986); People v. Peach, 174 Mich. App. 419, 437 N.W.2d 9 (1989).
- <sup>8</sup> Williams v. Taylor, 202 Ga. App. 720, 415 S.E.2d 498 (1992); Com. v. Hildreth, 30 Mass. App. Ct. 963, 572 N.E.2d 18 (1991).
- <sup>9</sup> Com. v. Burnette, 875 S.W.2d 865 (Ky. 1994).
- <sup>10</sup> Baker v. State, 588 So. 2d 945 (Ala. Crim. App. 1991); State v. West, 173 Ariz. 602, 845 P.2d 1097 (Ct. App. Div. 1 1992); Mississippi State Bd. of Nursing v. Wilson, 624 So. 2d 485 (Miss. 1993); State v. Turnbough, 876 S.W.2d 19 (Mo. Ct. App. E.D. 1994); State v. Sharon, 136 N.H. 764, 622 A.2d 840 (1993).
- <sup>11</sup> People v. Butcher, 257 Ill. App. 3d 1051, 196 Ill. Dec. 501, 630 N.E.2d 198 (2d Dist. 1994); State v. Millsap, 403 N.W.2d 56 (Iowa Ct. App. 1987); Amen v. State, 106 Nev. 749, 801 P.2d 1354 (1990).  
The mere showing of the falsity of a statement is insufficient. Riley v. Commissioner of Internal Revenue, T.C. Memo. 2016-46, T.C.M. (RIA) P 2016-046 (2016) (applying California law).
- <sup>12</sup> Baker v. State, 588 So. 2d 945 (Ala. Crim. App. 1991); Walsh v. State, 758 P.2d 124 (Alaska Ct. App. 1988); State v. McMellen, 872 S.W.2d 508 (Mo. Ct. App. W.D. 1994); State v. Sharon, 136 N.H. 764, 622 A.2d 840 (1993); State v. Hurst, 507 N.W.2d 918 (S.D. 1993).  
The mere showing of nonperformance is insufficient. Riley v. Commissioner of Internal Revenue, T.C. Memo. 2016-46, T.C.M. (RIA) P 2016-046 (2016) (applying California law).

<sup>13</sup> Nelson v. U.S., 227 F.2d 21, 53 A.L.R.2d 1206 (D.C. Cir. 1955); Eddins v. State, 501 So. 2d 574 (Ala. Crim. App. 1986); People v. Butcher, 257 Ill. App. 3d 1051, 196 Ill. Dec. 501, 630 N.E.2d 198 (2d Dist. 1994).

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## 32 Am. Jur. 2d False Pretenses § 27

American Jurisprudence, Second Edition | May 2021 Update

### False Pretenses

Lucas Martin, J.D.

#### II. Elements of Offense

##### B. Knowledge and Design

### § 27. Intent to defraud—Honest belief or claim of right defense

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 5

An intent to deprive, an element of theft by deception, does not lie where the defendant has a right to the property.<sup>1</sup> Additionally, if the accused acted in the honest belief that he or she had the right to appropriate the money or property, or acted in the honest belief that the owner, if present, would have consented to the appropriation, he or she may assert an “honest belief” or “claim of right” defense.<sup>2</sup> Such a defense is inconsistent with a false representation made to induce the victim to part with his or her property.<sup>3</sup> But an honest belief or claim of right is not a complete defense to a charge of false pretenses, it bears only on the issue of intent.<sup>4</sup>

If the accused acted in the honest belief that he or she had the right to appropriate the money or property, or acted in the honest belief that the owner, if present, would have consented to the appropriation, he or she may assert an “honest belief” or “claim of right” defense.<sup>5</sup> In order to successfully assert an “honest belief” or “claim of right” defense, a defendant must offer evidence as to his or her state of mind and the basis therefor.<sup>6</sup> However, neither the court nor the jury is bound by the defendant’s own evidence of what his or her intent was.<sup>7</sup> An honest belief or claim of right defense is not a complete defense to a charge of false pretenses, it bears only on the issue of intent.<sup>8</sup> Such a defense is inconsistent with a false representation made to induce the victim to part with his or her property.<sup>9</sup>

#### Caution:

In one jurisdiction, the lack of an honest belief that the defendant was entitled to the property she obtained is an element of the crime of theft by deception, which the prosecution is required to prove in the first instance, rather than an affirmative defense typically raised by the defendant.<sup>10</sup>

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Footnotes

- <sup>1</sup> § 33.
- <sup>2</sup> *Ex parte Wood*, 564 So. 2d 860 (Ala. 1990); *State v. Kramer*, 809 S.W.2d 50 (Mo. Ct. App. E.D. 1991).
- <sup>3</sup> *State v. Stanton*, 68 Wash. App. 855, 845 P.2d 1365 (Div. 2 1993).
- <sup>4</sup> *Barron v. State*, 105 Nev. 767, 783 P.2d 444 (1989).
- <sup>5</sup> *Ex parte Wood*, 564 So. 2d 860 (Ala. 1990); *State v. Kramer*, 809 S.W.2d 50 (Mo. Ct. App. E.D. 1991).
- <sup>6</sup> *Fraidin v. State*, 85 Md. App. 231, 583 A.2d 1065 (1991); *State v. Kramer*, 809 S.W.2d 50 (Mo. Ct. App. E.D. 1991).
- <sup>7</sup> *Mississippi State Bd. of Nursing v. Wilson*, 624 So. 2d 485 (Miss. 1993); *State v. Kramer*, 809 S.W.2d 50 (Mo. Ct. App. E.D. 1991).
- <sup>8</sup> *Barron v. State*, 105 Nev. 767, 783 P.2d 444 (1989).
- <sup>9</sup> *State v. Stanton*, 68 Wash. App. 855, 845 P.2d 1365 (Div. 2 1993).
- <sup>10</sup> *State v. Cox*, 2012 UT App 234, 286 P.3d 15 (Utah Ct. App. 2012).

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## 32 Am. Jur. 2d False Pretenses § 28

American Jurisprudence, Second Edition | May 2021 Update

### False Pretenses

Lucas Martin, J.D.


#### II. Elements of Offense

##### B. Knowledge and Design

### § 28. Necessity that there be specific intent to defraud as to particular property or person

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  5

The intent of the accused to injure or defraud a particular person or to obtain a particular thing is not an element of the crime of obtaining money or property by false pretenses.<sup>1</sup> It is enough that the accused had a specific intent to defraud, in other words, to act willfully with the specific purpose to deceive or cheat at someone else's loss or his or her gain.<sup>2</sup>

In some jurisdictions, it has been recognized that an intent to defraud need not be directed against the legal owner, and that it is sufficient if it is directed against anyone in possession of the goods or anyone who parts with property in reliance on the misrepresentation.<sup>3</sup>

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#### Footnotes

<sup>1</sup> U.S. v. Jacobowitz, 877 F.2d 162 (2d Cir. 1989); State v. McBride, 187 N.C. App. 496, 653 S.E.2d 218 (2007); State v. Wilson, 230 Or. 251, 369 P.2d 739 (1962); State v. Markarian, 551 A.2d 1178 (R.I. 1988); State v. Pruitt, 178 W. Va. 147, 358 S.E.2d 231 (1987).

<sup>2</sup> People v. Butcher, 257 Ill. App. 3d 1051, 196 Ill. Dec. 501, 630 N.E.2d 198 (2d Dist. 1994).

<sup>3</sup> Muhammed v. State, 300 Ark. 112, 776 S.W.2d 825 (1989); People v. Moran, 260 Ill. App. 3d 154, 198 Ill. Dec. 504, 632 N.E.2d 1115 (2d Dist. 1994); State v. Rodgers, 230 N.J. Super. 593, 554 A.2d 866 (App. Div. 1989).

## 32 Am. Jur. 2d False Pretenses II C Refs.

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II. Elements of Offense

C. Acquisition of Something of Value

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 11 to 14

#### A.L.R. Library

A.L.R. Index, False Pretenses

A.L.R. Index, Fraud and Deceit

A.L.R. Index, Tricks and Trickery

West's A.L.R. Digest, [False Pretenses](#)  4, 11 to 14

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## 32 Am. Jur. 2d False Pretenses § 29

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False Pretenses

Lucas Martin, J.D.

### II. Elements of Offense

#### C. Acquisition of Something of Value

##### 1. In General

## § 29. Requirements as to “obtaining” money or property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West’s Key Number Digest

West’s Key Number Digest, [False Pretenses](#)  4, 12, 14

The offense of obtaining money or property by false pretenses is not committed until the money or property has been obtained.<sup>1</sup> So long as the intended victim of the crime retains control over the property, the crime of obtaining property by false pretenses is not consummated.<sup>2</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Under the federal-program fraud statute, the Government has to show not only that defendants engaged in deception, but that an object of their fraud was property. [18 U.S.C.A. § 666\(a\)\(1\)\(A\)](#). [Kelly v. United States, 140 S. Ct. 1565 \(2020\)](#).

## [END OF SUPPLEMENT]

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### Footnotes

<sup>1</sup> [Clark v. State, 308 Ark. 84, 308 Ark. 453, 824 S.W.2d 345 \(1992\)](#); [People v. Novitskiy, 81 P.3d 1070 \(Colo. App. 2003\)](#); [State v. Walston, 140 N.C. App. 327, 536 S.E.2d 630 \(2000\)](#); [State v. Fowler, 745 P.2d 472 \(Utah Ct. App. 1987\)](#); [Shropshire v. Com., 40 Va. App. 34, 577 S.E.2d 521 \(2003\)](#).

A defendant’s false representation to a city housing authority of his intent to occupy a subsidized rental unit, upon

which representation the housing authority relied upon in approving the lease on an annual basis, when in fact the unit was occupied by the defendant’s niece who was not qualified for housing assistance, constituted a “taking,” within the meaning of a larceny by false pretense, and not a mere unauthorized use. [Com. v. Alvarez, 90 Mass. App. Ct. 158, 57 N.E.3d 1036 \(2016\)](#).

<sup>2</sup> [Chandler v. State, 615 So. 2d 100 \(Ala. Crim. App. 1992\)](#).

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## 32 Am. Jur. 2d False Pretenses § 30

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False Pretenses

Lucas Martin, J.D.

### II. Elements of Offense

#### C. Acquisition of Something of Value

##### 1. In General

## § 30. Necessity of obtaining title to property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 11, 12

Generally, the crime of obtaining property by false pretenses occurs when a thief via the utterance of false pretenses, obtains both possession and title to the property.<sup>1</sup> However, the doctrine that one must obtain title as well as possession in order to be guilty of the crime of obtaining property by false pretenses cannot mean that one must obtain an absolute title, since any title obtained by fraud is voidable and such a requirement would make it impossible for the crime to be consummated.<sup>2</sup> In some jurisdictions, an essential element of larceny by false pretenses is that both title to and possession of property must pass from the victim to the defendant or his or her nominee.<sup>3</sup>

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### Footnotes

- <sup>1</sup> [Powell v. State](#), 2012 WY 106, 282 P.3d 163 (Wyo. 2012).  
Larceny by false pretenses, unlike larceny by trick, requires that title or ownership pass to the perpetrator. [Reid v. Com.](#), 65 Va. App. 745, 781 S.E.2d 373 (2016).
- <sup>2</sup> [Chappell v. State](#), 216 Ind. 666, 25 N.E.2d 999 (1940).  
A person can be guilty of obtaining property by false pretenses without receiving absolute title to the property. [Nelson v. U.S.](#), 227 F.2d 21, 53 A.L.R.2d 1206 (D.C. Cir. 1955).
- <sup>3</sup> [Shropshire v. Com.](#), 40 Va. App. 34, 577 S.E.2d 521 (2003).



## 32 Am. Jur. 2d False Pretenses § 31

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False Pretenses

Lucas Martin, J.D.

### II. Elements of Offense


#### C. Acquisition of Something of Value

##### 1. In General

## § 31. Delivery of property to, or for benefit of, third party

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 11, 13

For the offense of obtaining property by false pretenses to be consummated, it is not necessary that the property be obtained by the accused him- or herself; it is sufficient if the property is obtained for the benefit of another,<sup>1</sup> or is delivered to another.<sup>2</sup>

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### Footnotes

<sup>1</sup> [Steeley v. City of Gadsden](#), 533 So. 2d 671 (Ala. Crim. App. 1988); [Arnold v. State](#), 210 Ga. App. 843, 437 S.E.2d 844 (1993); [State v. Ulvestad](#), 414 N.W.2d 737 (Minn. Ct. App. 1987); [Bray v. Com.](#), 9 Va. App. 417, 388 S.E.2d 837 (1990).

<sup>2</sup> [People v. Cheeley](#), 106 Cal. App. 2d 748, 236 P.2d 22 (2d Dist. 1951); [State v. O'Neil](#), 141 Wis. 2d 535, 416 N.W.2d 77 (Ct. App. 1987).

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## 32 Am. Jur. 2d False Pretenses § 32

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### False Pretenses

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#### II. Elements of Offense

##### C. Acquisition of Something of Value

###### 1. In General

### § 32. Requirement of injury or prejudice resulting from transfer of money or property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 11, 12, 14

Under some statutes it has been held that for a conviction of obtaining money or property by false pretenses to be sustained, someone must have been prejudiced in some manner.<sup>1</sup> The property or money obtained under false pretenses is required to be to the detriment or injury of the person from whom the defendant obtains the same.<sup>2</sup> Some modern theft by deception statutes, however, do not require injury to the victim.<sup>3</sup> In such jurisdictions, the victim of a theft by deception need not suffer any pecuniary loss as a result of the defendant's actions.<sup>4</sup> The gravamen of the offense is in the making of the false pretense with intent to defraud and thereby obtaining another's property,<sup>5</sup> and the victim is not required to sustain a pecuniary loss.<sup>6</sup> The offense is complete when money or property has been obtained by false representations and cannot be purged by subsequent restoration or repayment.<sup>7</sup> The actual repayment of a loan obtained by false pretenses does not constitute a defense against a criminal prosecution for obtaining money by false pretenses.<sup>8</sup>

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#### Footnotes

<sup>1</sup> [People v. Stewart](#), 739 P.2d 854 (Colo. 1987); [Ledford v. State](#), 184 Ga. App. 556, 362 S.E.2d 133 (1987); [Com. v. Burnette](#), 875 S.W.2d 865 (Ky. 1994); [Allred v. State](#), 605 So. 2d 758 (Miss. 1992).

<sup>2</sup> [Martin v. State](#), 87 So. 3d 1145 (Miss. Ct. App. 2012).

<sup>3</sup> [State v. Schultz](#), 252 Kan. 819, 850 P.2d 818, 33 A.L.R.5th 835 (1993); [State v. Gruber](#), 132 N.H. 83, 562 A.2d 156 (1989).

<sup>4</sup> [State v. Bouchard](#), 2005 ME 106, 881 A.2d 1130 (Me. 2005); [State v. Quinn](#), 2001 SD 25, 623 N.W.2d 36 (S.D. 2001).

<sup>5</sup> [People v. Butcher](#), 257 Ill. App. 3d 1051, 196 Ill. Dec. 501, 630 N.E.2d 198 (2d Dist. 1994); [State v. Hendon](#), 170 La.

488, 128 So. 286 (1930).

<sup>6</sup> State v. Mills, 96 Ariz. 377, 396 P.2d 5 (1964); Arnold v. State, 210 Ga. App. 843, 437 S.E.2d 844 (1993); State v. Hurst, 507 N.W.2d 918 (S.D. 1993); State v. Fowler, 745 P.2d 472 (Utah Ct. App. 1987).

<sup>7</sup> State v. Martin, 105 N.C. App. 182, 412 S.E.2d 134 (1992); State v. Fowler, 745 P.2d 472 (Utah Ct. App. 1987); Miller v. State, 732 P.2d 1054 (Wyo. 1987).

<sup>8</sup> Com. v. Stovall, 22 Mass. App. Ct. 737, 498 N.E.2d 126 (1986).

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## 32 Am. Jur. 2d False Pretenses § 33

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False Pretenses

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### II. Elements of Offense


#### C. Acquisition of Something of Value

##### 1. In General

## § 33. Obtaining accused's own property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 14

One cannot be guilty of obtaining by false pretenses personal property to which one is entitled.<sup>1</sup> Specifically, an intent to deprive, an element of theft by deception, does not lie where the defendant has a right to the property.<sup>2</sup> The identity of a property owner is immaterial to a charge for larceny by false pretense; rather, the prosecution need only establish, beyond a reasonable doubt, that the property belonged to someone other than the defendant.<sup>3</sup>

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### Footnotes

<sup>1</sup> [State v. Joy](#), 65 Wash. App. 33, 827 P.2d 1065 (Div. 1 1992), opinion corrected, (May 26, 1992) and aff'd in part, rev'd in part on other grounds, 121 Wash. 2d 333, 851 P.2d 654 (1993).

<sup>2</sup> [State v. Manion](#), 442 Md. 419, 112 A.3d 506 (2015).  
As to honest belief in right to property as negating intent, see [§ 27](#).

<sup>3</sup> [Com. v. Alvarez](#), 90 Mass. App. Ct. 158, 57 N.E.3d 1036 (2016).

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## 32 Am. Jur. 2d False Pretenses § 34

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False Pretenses

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### II. Elements of Offense


#### C. Acquisition of Something of Value

##### 1. In General

## § 34. Effect of obtaining property of debtor

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 14

### A.L.R. Library

[Obtaining payment by debtor on valid indebtedness by false representation as criminal false pretenses, 20 A.L.R.2d 1266](#)

Even if an individual is owed money, and therefore his or her procurement of it does not actually injure his or her debtor, he or she is not entitled to obtain his or her money by the use of fraud or false pretenses.<sup>1</sup>

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### Footnotes

<sup>1</sup> [U.S. v. Martin, 798 F.2d 308, 21 Fed. R. Evid. Serv. 111, 21 Fed. R. Evid. Serv. 722 \(8th Cir. 1986\).](#)

## 32 Am. Jur. 2d False Pretenses § 35

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### False Pretenses

Lucas Martin, J.D.

#### II. Elements of Offense


##### C. Acquisition of Something of Value

##### 2. Thing Obtained

### § 35. Necessity that thing have value; intangible thing

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 11

It is an essential element of the crime of obtaining property under false pretenses that the thing obtained have some value, and where this element is lacking, there is no crime.<sup>1</sup> Value, in this context, is an objective determination.<sup>2</sup> Some courts have recognized, moreover, that all that is required is some value, however little that might be.<sup>3</sup> It has been recognized in some jurisdictions that the exact monetary value of the property obtained is relevant only for the purpose of grading the offense for sentencing purposes.<sup>4</sup>

The offense of obtaining money or other valuable thing by false pretenses applies not just to property whose ownership may be evidenced by documents of title, but also to intangible things with determinable value.<sup>5</sup>

#### CUMULATIVE SUPPLEMENT

##### Cases:

Time and labor employees of Port Authority of New York and New Jersey expended in connection with scheme in which defendants, a Port Authority official and New Jersey Governor's Deputy Chief of Staff, sought to impose traffic gridlock in city to punish its mayor for refusing to endorse Governor's reelection bid by reallocating city's access lanes to bridge administered by Port Authority, under guise of conducting a traffic study, were just the implementation costs of defendants' scheme, and thus could not support defendants' convictions under federal wire fraud and federal-program fraud statutes; neither defendant sought to obtain services provided by the employees, who were back-up toll collectors and traffic engineers who collected data for the sham study. 18 U.S.C.A. §§ 666(a)(1)(A), 1343. [Kelly v. United States](#), 140 S. Ct. 1565 (2020).



[END OF SUPPLEMENT]

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Footnotes

- <sup>1</sup> U.S. v. Edwards, 816 F. Supp. 272 (D. Del. 1993); Ex parte Oliver, 518 So. 2d 705 (Ala. 1987); People v. Carlson, 72 P.3d 411 (Colo. App. 2003); State v. Rochette, 25 Conn. App. 298, 594 A.2d 1006 (1991); Mississippi State Bd. of Nursing v. Wilson, 624 So. 2d 485 (Miss. 1993); State v. Buchanan, 801 S.E.2d 366 (N.C. Ct. App. 2017). Obtaining money based upon a fraudulent representation is theft by false pretenses. People v. Guzman, 201 Cal. App. 4th 1090, 134 Cal. Rptr. 3d 66 (2d Dist. 2011). First victim's fraudulently induced payment to a second victim constituted a valuable thing to the defendant for the purposes of the offense of obtaining money or other valuable thing by false pretenses, because the payment was used as a partial repayment of the defendant's debt to second victim. Logsdon v. State, 2010 OK CR 7, 231 P.3d 1156 (Okla. Crim. App. 2010), as corrected, (June 22, 2010).
- <sup>2</sup> People v. Carlson, 72 P.3d 411 (Colo. App. 2003).
- <sup>3</sup> McCormick v. State, 161 So. 2d 696 (Fla. 2d DCA 1964); State v. Dickens, 243 Kan. 574, 757 P.2d 321 (1988); State v. Agosta, 173 Vt. 97, 787 A.2d 1252 (2001) (value over \$25).
- <sup>4</sup> State v. Roche, Inc., 2 Neb. App. 445, 511 N.W.2d 195 (1994), judgment rev'd on other grounds, 246 Neb. 568, 520 N.W.2d 539 (1994).
- <sup>5</sup> Logsdon v. State, 2010 OK CR 7, 231 P.3d 1156 (Okla. Crim. App. 2010), as corrected, (June 22, 2010).

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## 32 Am. Jur. 2d False Pretenses § 36

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### False Pretenses

Lucas Martin, J.D.

#### II. Elements of Offense

##### C. Acquisition of Something of Value

##### 2. Thing Obtained

### § 36. Checks, notes, and the like as property within false pretenses statutes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 11, 13

Checks, notes, and the like, obtained from the person executing them, have been held to come within the protection of statutes making it a crime to obtain property or a thing of value by false pretenses,<sup>1</sup> and are sometimes the subject of statutes specifically dealing with fraud involving such instruments.<sup>2</sup>

A letter of credit is encompassed within a statute prohibiting the making of false statements in order to influence a financial institution's action upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan; though not specifically listed in the statute, a letter of credit is a commitment made by a bank to honor demands for payment from a beneficiary.<sup>3</sup> Disability insurance policies that a defendant obtains after misrepresenting his or her employment constitute "property" within the meaning of a statute criminalizing larceny by false pretenses.<sup>4</sup> A provisional credit, placed in a defendant's bank account by the bank after the defendant claimed that his girlfriend fraudulently signed and cashed checks drawn on his account, was a thing of value, sufficient to sustain a conviction for obtaining property by false pretenses when it was found that the defendant authorized his girlfriend to use the checks; the provisional credit was the equivalent of money being placed in the defendant's account, to which he had access, at least temporarily.<sup>5</sup>

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#### Footnotes

<sup>1</sup> [U.S. v. Edwards](#), 816 F. Supp. 272 (D. Del. 1993); [State v. Dickens](#), 243 Kan. 574, 757 P.2d 321 (1988).

<sup>2</sup> [18 U.S.C.A. § 1025](#) (regarding false pretenses on the high seas and other waters, making it a crime to obtain by false pretenses any bond, bill, receipt, promissory note, draft, or check, or other evidence of indebtedness). Federal statutes pertaining to false pretenses on the high seas and other waters, see [§ 78](#).

<sup>3</sup> [U.S. v. Agne](#), 214 F.3d 47, 54 Fed. R. Evid. Serv. 894 (1st Cir. 2000).

<sup>4</sup> [Com. v. Litwinsky, 65 Mass. App. Ct. 1122, 843 N.E.2d 1117 \(2006\).](#)

<sup>5</sup> [State v. Buchanan, 801 S.E.2d 366 \(N.C. Ct. App. 2017\).](#)

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## 32 Am. Jur. 2d False Pretenses § 37

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False Pretenses

Lucas Martin, J.D.

### II. Elements of Offense


#### C. Acquisition of Something of Value

##### 2. Thing Obtained

## § 37. Obtaining signatures by false pretenses

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 13

Statutes in some jurisdictions make it a crime to obtain by false pretenses the signature of any person to a written instrument.<sup>1</sup> However, the phrase “sign or execute” does not include the action of a court clerk filing and recording a document, as that phrase is used in a statute providing that a person commits the offense of securing the execution of a document by deception if, with intent to defraud or harm any person, he, by deception, causes another to sign or execute any document affecting property or service or the pecuniary interest of any person.<sup>2</sup>

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### Footnotes

<sup>1</sup> [People v. McConnell](#), 11 Ill. App. 2d 370, 137 N.E.2d 558 (3d Dist. 1956); [Sheriff, Clark County v. Crockett](#), 102 Nev. 359, 724 P.2d 203 (1986); [State v. Simmans](#), 18 Ohio App. 2d 143, 47 Ohio Op. 2d 251, 247 N.E.2d 785 (6th Dist. Lucas County 1969), judgment rev'd on other grounds, 21 Ohio St. 2d 258, 50 Ohio Op. 2d 487, 257 N.E.2d 344 (1970).

<sup>2</sup> [Liverman v. State](#), 448 S.W.3d 155 (Tex. App. Fort Worth 2014), petition for discretionary review granted, (Feb. 4, 2015) and judgment aff'd, 470 S.W.3d 831 (Tex. Crim. App. 2015).

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## 32 Am. Jur. 2d False Pretenses § 38

American Jurisprudence, Second Edition | May 2021 Update

### False Pretenses

Lucas Martin, J.D.

#### II. Elements of Offense

##### C. Acquisition of Something of Value

##### 2. Thing Obtained

### § 38. Obtaining loan or renewal or guarantee thereof by false pretenses

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 11, 13

A larceny by false pretenses may be based upon the obtaining of a loan.<sup>1</sup> Specifically, a person who obtains a loan of money by false representation of a past or existing fact is guilty of obtaining it by false pretense,<sup>2</sup> despite an intention to repay the loan.<sup>3</sup> The state may not be required to prove receipt of the loan.<sup>4</sup> However, the obtaining of a renewal or extension of an existing loan does not constitute the obtaining of something by false pretenses, since the extension is a mere pecuniary advantage, devoid of any of the physical attributes of money, a chattel, or a valuable security in the sense of the statute.<sup>5</sup>

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#### Footnotes

- <sup>1</sup> [Com. v. McCauliff](#), 461 Mass. 635, 963 N.E.2d 719 (2012). Defendant took both possession and ownership of victims' funds, in support of a conviction of larceny by false pretenses, by enticing victims to loan him money for the ostensible purpose of recovering his vehicle without ever retrieving his car or returning the money; the defendant was not using the money on the victims' behalf or at their behest, and the victims clearly relinquished the funds for the defendant to use for his own benefit. [Reid v. Com.](#), 65 Va. App. 745, 781 S.E.2d 373 (2016).
- <sup>2</sup> [Com. v. Stovall](#), 22 Mass. App. Ct. 737, 498 N.E.2d 126 (1986); [State v. Rodgers](#), 230 N.J. Super. 593, 554 A.2d 866 (App. Div. 1989); [State v. Fowler](#), 745 P.2d 472 (Utah Ct. App. 1987).
- <sup>3</sup> [State v. Mills](#), 96 Ariz. 377, 396 P.2d 5 (1964); [Com. v. Stovall](#), 22 Mass. App. Ct. 737, 498 N.E.2d 126 (1986).
- <sup>4</sup> [Jones v. State](#), 343 S.W.3d 550 (Tex. App. Fort Worth 2011) (evidence that the defendant sought loans in amounts of \$680,000 and \$544,000 through the use of materially false or misleading statements was sufficient to support convictions on each of six counts of making a false statement to obtain property or credit of more than \$200,000; State was not required to prove that the defendant actually obtained such loans).

<sup>5</sup> State v. Tower, 122 Kan. 165, 251 P. 401, 52 A.L.R. 1160 (1926); State v. Reed, 815 S.W.2d 474 (Mo. Ct. App. E.D. 1991).

## 32 Am. Jur. 2d False Pretenses § 39

American Jurisprudence, Second Edition | May 2021 Update

### False Pretenses

Lucas Martin, J.D.

#### II. Elements of Offense


##### C. Acquisition of Something of Value

##### 2. Thing Obtained

## § 39. Obtaining services by false pretenses

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 11

Statutes in some jurisdictions specifically prohibit obtaining labor or personal services by false pretenses.<sup>1</sup>

Telephone service has been held to be within a statute making it criminal to obtain property or other valuable thing by false pretenses.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Brackhan v. State](#), 839 P.2d 414 (Alaska Ct. App. 1992); [Daley v. State](#), 236 Ark. 89, 364 S.W.2d 678 (1963); [Nichols v. State](#), 210 Ga. App. 134, 435 S.E.2d 502 (1993); [State v. Clemmons](#), 111 N.C. App. 569, 433 S.E.2d 748 (1993).

<sup>2</sup> [Stokes v. State](#), 1961 OK CR 76, 366 P.2d 425 (Okla. Crim. App. 1961).  
The electricity used by a telecommunications provider from which the defendant was charged with committing theft by property by fraud was its “property” for purposes of the theft-by-fraud statute; the provider purchased and stored electricity to power its network, and when consumers made phone calls, the provider had to buy more electricity. [State v. Steffes](#), 2013 WI 53, 347 Wis. 2d 683, 832 N.W.2d 101 (2013).

## 32 Am. Jur. 2d False Pretenses § 40

American Jurisprudence, Second Edition | May 2021 Update

False Pretenses

Lucas Martin, J.D.

### II. Elements of Offense


#### C. Acquisition of Something of Value

##### 2. Thing Obtained

## § 40. Obtaining charitable donations by false pretenses

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 11

One who obtains a charitable donation by false representation may be convicted of obtaining money by false pretenses.<sup>1</sup>

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### Footnotes

<sup>1</sup> [Com. v. Atwood, 411 Pa. Super. 137, 601 A.2d 277 \(1991\).](#)

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## 32 Am. Jur. 2d False Pretenses § 41

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### False Pretenses

Lucas Martin, J.D.

#### II. Elements of Offense


##### C. Acquisition of Something of Value

##### 2. Thing Obtained

## § 41. Obtaining public benefits by false pretenses

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 11

#### A.L.R. Library

[Criminal liability under state laws in connection with application for, or receipt of, public welfare payments, 22 A.L.R.4th 534](#)

[Criminal liability for wrongfully obtaining unemployment benefits, 80 A.L.R.3d 1280](#)

False statements concerning one's employment, income, and the like in an application for unemployment benefits,<sup>1</sup> public relief,<sup>2</sup> or Medicare reimbursement payments, may be the basis for a prosecution for obtaining money by false pretenses.<sup>3</sup>

However, based upon the policy not to permit prosecutions under the general provisions of the penal code when there are special penal provisions available, it has been held that a conviction under a penal provision making obtaining money by false pretenses a felony is improper where the wrongful conduct also violates a provision of an unemployment compensation law,<sup>4</sup> or a welfare fraud law.<sup>5</sup>

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#### Footnotes

<sup>1</sup> [People v. Serna, 43 Cal. App. 2d 106, 110 P.2d 492 \(2d Dist. 1941\)](#) (disapproved of on other grounds by, [People v. Bailey, 55 Cal. 2d 514, 11 Cal. Rptr. 543, 360 P.2d 39 \(1961\)](#)); [State v. Drake, 79 N.J. Super. 458, 191 A.2d 802 \(App. Div. 1963\)](#).

- <sup>2</sup> [State v. Robins](#), 34 Conn. App. 694, 643 A.2d 881 (1994), judgment aff'd, 233 Conn. 527, 660 A.2d 738 (1995); [State v. Jones](#), 13 Kan. App. 2d 520, 775 P.2d 183 (1989), decision aff'd, 246 Kan. 180, 787 P.2d 738 (1990); [State v. Crumley](#), 223 Mont. 224, 725 P.2d 214 (1986); [State v. Pickell](#), 136 N.J. Super. 340, 346 A.2d 109 (App. Div. 1975). An approved lease for a government subsidized rental unit constituted "property," within the meaning of larceny by false pretense, and thus, a city housing authority parted with property when it approved a defendant for government subsidized housing, in reliance on the defendant's false representation that he intended to reside in the unit, when in fact the unit was occupied by the defendant's niece who did not qualify for subsidized housing, regardless of whether the defendant paid rent; the lease gave defendant possession of government subsidized housing unit below fair market rental rate, and thus, the defendant obtained by false pretenses something of value for which he did not pay, namely, difference between market rent for the apartment and the reduced rent actually paid. [Com. v. Alvarez](#), 90 Mass. App. Ct. 158, 57 N.E.3d 1036 (2016).
- <sup>3</sup> [U.S. v. Siddiqi](#), 959 F.2d 1167 (2d Cir. 1992).
- <sup>4</sup> [Com. v. Buzak](#), 197 Pa. Super. 514, 179 A.2d 248 (1962).
- <sup>5</sup> [State v. Classen](#), 242 Kan. 192, 747 P.2d 784 (1987).

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## 32 Am. Jur. 2d False Pretenses II D Refs.

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False Pretenses

Lucas Martin, J.D.

### II. Elements of Offense

#### D. Reliance by Victim on Representation Made

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 9, 10

### A.L.R. Library

A.L.R. Index, False Pretenses

A.L.R. Index, Fraud and Deceit

A.L.R. Index, Tricks and Trickery

West's A.L.R. Digest, [False Pretenses](#)  4, 9, 10

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## 32 Am. Jur. 2d False Pretenses § 42

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### False Pretenses

Lucas Martin, J.D.


#### II. Elements of Offense

##### D. Reliance by Victim on Representation Made

### § 42. Necessity of reliance by victim on misrepresentation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 9, 10

#### A.L.R. Library

[Changing of price tags by patron in self-service store as criminal offense](#), 60 A.L.R.3d 1293

To establish the crime of obtaining money or property by false pretenses, it must be shown that the defrauded party relied upon the misrepresentation made by the defendant,<sup>1</sup> and that such person was deceived.<sup>2</sup> A victim does not rely on a false representation, as required to support a conviction for theft by false pretenses, if there is no causal connection shown between the representations alleged to be false and the transfer of property.<sup>3</sup>

If the person allegedly defrauded knew that the representation was false, the offense has not been committed.<sup>4</sup>

Some modern false pretenses statutes do not require that the party defrauded relied to his or her detriment on the misrepresentation or deception.<sup>5</sup>

To convict one of obtaining money or property by false pretenses, it is not necessary, assuming that reliance upon a false representation is a required element, that the false representations be made to the person defrauded.<sup>6</sup> However, the victim must be aware of the false information in order to rely on it in support of a conviction.<sup>7</sup> A false representation to an agent or clerk is a false representation to the principal.<sup>8</sup>

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#### Footnotes

- <sup>1</sup> Yeager v. State, 500 So. 2d 1260 (Ala. Crim. App. 1986); People v. Hartley, 248 Cal. App. 4th 620, 203 Cal. Rptr. 3d 770 (6th Dist. 2016); People v. Prendergast, 87 P.3d 175 (Colo. App. 2003); State v. Maxon, 32 Kan. App. 2d 67, 79 P.3d 202 (2003); Com. v. Burnette, 875 S.W.2d 865 (Ky. 1994); Com. v. Long, 90 Mass. App. Ct. 696, 63 N.E.3d 1123 (2016); State v. McMellen, 872 S.W.2d 508 (Mo. Ct. App. W.D. 1994); People v. Casiano, 117 A.D.3d 1507, 984 N.Y.S.2d 781 (4th Dep't 2014); State v. Worden, 115 Or. App. 376, 838 P.2d 640 (1992); State v. Grant, 840 A.2d 541 (R.I. 2004); Maycock v. State, 2011 WY 104, 257 P.3d 20 (Wyo. 2011).
- <sup>2</sup> State v. Schultz, 252 Kan. 819, 850 P.2d 818, 33 A.L.R.5th 835 (1993); State v. Smith, 743 S.W.2d 866 (Mo. Ct. App. E.D. 1987); State v. Phillips, 797 S.E.2d 704 (N.C. Ct. App. 2017); State v. Arnold, 719 S.W.2d 543 (Tenn. Crim. App. 1986).
- <sup>3</sup> Harris v. Garcia, 734 F. Supp. 2d 973 (N.D. Cal. 2010) (applying California law).  
The State failed to prove that the owner of military gear transferred it to the defendant in reliance on the defendant's false statements or representations, as required to convict the defendant of theft by deception; the defendant's false statements that she had sent the gear to different locations were all post facto and did not induce a transfer. *State v. Laborde*, 303 Kan. 1, 360 P.3d 1080 (2015).
- <sup>4</sup> State v. Finch, 223 Kan. 398, 573 P.2d 1048 (1978); State v. Smith, 743 S.W.2d 866 (Mo. Ct. App. E.D. 1987); State v. Mann, 244 N.J. Super. 622, 583 A.2d 372 (App. Div. 1990); Com. v. Imes, 424 Pa. Super. 633, 623 A.2d 859 (1993).
- <sup>5</sup> Clark v. State, 308 Ark. 84, 308 Ark. 453, 824 S.W.2d 345 (1992); People v. Moran, 260 Ill. App. 3d 154, 198 Ill. Dec. 504, 632 N.E.2d 1115 (2d Dist. 1994); Broadway v. State, 1991 OK CR 113, 818 P.2d 1253 (Okla. Crim. App. 1991).
- <sup>6</sup> State v. Melvin, 99 N.C. App. 16, 392 S.E.2d 740 (1990); Grites v. Com., 9 Va. App. 51, 384 S.E.2d 328 (1989).
- <sup>7</sup> Izquierdo v. State, 177 So. 3d 1018 (Fla. 3d DCA 2015), review denied, 192 So. 3d 38 (Fla. 2015) (obtaining a mortgage by false pretenses).
- <sup>8</sup> People v. Termotto, 81 N.Y.2d 1008, 599 N.Y.S.2d 910, 616 N.E.2d 496 (1993); State v. Wilson, 230 Or. 251, 369 P.2d 739 (1962).

## 32 Am. Jur. 2d False Pretenses § 43

American Jurisprudence, Second Edition | May 2021 Update

### False Pretenses

Lucas Martin, J.D.


#### II. Elements of Offense

##### D. Reliance by Victim on Representation Made

### § 43. Requirement that false representation be substantial inducement

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 9, 10

To be criminal, a false pretense must have induced a transfer of money or property.<sup>1</sup> It is not necessary that the false pretense be the sole inducement that moved the defrauded person to part with his or her money or property; it is sufficient that the pretense materially contributed to this end and that without it the victim would not have parted with the money or property.<sup>2</sup>

The true inquiry, under the false pretense inducement element, is whether the false pretense, either operating alone or with other causes, had a controlling influence, or that without such pretense the owner would not have parted with his goods.<sup>3</sup> If a series of misrepresentations are involved, it is not necessary to show sufficient reliance on each one; it is enough if the victim relied to his or her detriment on the resulting deception.<sup>4</sup> However, if the defendant makes both true and false statements to the owner, but the false statements are irrelevant to the owner's decision to transfer the property, theft on the theory of false pretense has not been committed.<sup>5</sup>

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#### Footnotes

<sup>1</sup> U.S. v. Stever, 222 U.S. 167, 32 S. Ct. 51, 56 L. Ed. 145 (1911); State v. Thompson, 305 Conn. 806, 48 A.3d 640 (2012); State v. Rios, 246 Kan. 517, 792 P.2d 1065 (1990); Allred v. State, 605 So. 2d 758 (Miss. 1992); State v. Letts, 986 A.2d 1006 (R.I. 2010); State v. Fowler, 745 P.2d 472 (Utah Ct. App. 1987); Wynne v. Com., 18 Va. App. 459, 445 S.E.2d 160 (1994); Maycock v. State, 2011 WY 104, 257 P.3d 20 (Wyo. 2011).

<sup>2</sup> State v. Schultz, 252 Kan. 819, 850 P.2d 818, 33 A.L.R.5th 835 (1993); Demond v. State, 452 S.W.3d 435 (Tex. App. Austin 2014), petition for discretionary review refused, (Mar. 18, 2015); State v. Doe, 825 P.2d 681 (Utah Ct. App. 1992); Swinson v. Com., 16 Va. App. 923, 434 S.E.2d 348 (1993).

<sup>3</sup> Parker v. Com., 275 Va. 150, 654 S.E.2d 580 (2008).

<sup>4</sup> State v. Doe, 825 P.2d 681 (Utah Ct. App. 1992).

<sup>5</sup> [Harris v. Garcia, 734 F. Supp. 2d 973 \(N.D. Cal. 2010\) \(applying California law\).](#)

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## 32 Am. Jur. 2d False Pretenses § 44

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False Pretenses

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### II. Elements of Offense

#### D. Reliance by Victim on Representation Made

## § 44. Effect of victim's credulity

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 9, 10

It has sometimes been stated that foolish reliance by the victim of a preposterous fraud does not vitiate the guilt of the accused because such guilt does not depend on the credulity or folly of the person defrauded, but on the intent of the accused.<sup>1</sup> Nevertheless, it is the general rule that no criminal offense is committed if the misrepresentations are unlikely to deceive ordinary persons in the group addressed.<sup>2</sup>

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### Footnotes

<sup>1</sup> [Harwei, Inc. v. State](#), 459 N.E.2d 52 (Ind. Ct. App. 1984).

<sup>2</sup> [Yeager v. State](#), 500 So. 2d 1260 (Ala. Crim. App. 1986); [State v. Hollingsworth](#), 817 S.W.2d 479 (Mo. Ct. App. W.D. 1991); [Com. v. Bruce](#), 414 Pa. Super. 419, 607 A.2d 294 (1992); [State v. Hurst](#), 507 N.W.2d 918 (S.D. 1993).

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## 32 Am. Jur. 2d False Pretenses § 45

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### False Pretenses

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#### II. Elements of Offense

##### D. Reliance by Victim on Representation Made

### § 45. Effect of victim's failure to investigate truth of representation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  4, 9, 10

#### A.L.R. Library

[False statement as to existing encumbrance on chattel in obtaining loan or credit as criminal false pretense, 53 A.L.R.2d 1215](#)

Generally, the guilt of one charged with obtaining money or property by false pretenses does not depend on whether the victim could, with reasonable diligence or ordinary prudence, have ascertained that the representations were false.<sup>1</sup> One who has made false representations cannot excuse him- or herself by saying that if the victim was sharp, diligent, and astute, he or she could have detected the fraud by using means of detection available to him or her.<sup>2</sup> One who obtains money or property by falsely stating that the property one is selling is free from encumbrances is not relieved from guilt by the fact that the purchaser could have ascertained the falsity of the statement by examining the public records.<sup>3</sup>

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#### Footnotes

<sup>1</sup> [Yeager v. State, 500 So. 2d 1260 \(Ala. Crim. App. 1986\); Arnold v. State, 210 Ga. App. 843, 437 S.E.2d 844 \(1993\).](#)

<sup>2</sup> [Yeager v. State, 500 So. 2d 1260 \(Ala. Crim. App. 1986\); Cook v. State, 170 Tenn. 245, 94 S.W.2d 386 \(1936\).](#)

<sup>3</sup> [People v. Jory, 443 Mich. 403, 505 N.W.2d 228 \(1993\).](#)

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### 32 Am. Jur. 2d False Pretenses III Refs.

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False Pretenses


Lucas Martin, J.D.

#### III. Attempt to Commit Offense

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest


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#### A.L.R. Library

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A.L.R. Index, Tricks and Trickery

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## 32 Am. Jur. 2d False Pretenses § 46

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### False Pretenses


Lucas Martin, J.D.

### III. Attempt to Commit Offense

## § 46. Elements of attempt, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  21

#### A.L.R. Library

[Changing of price tags by patron in self-service store as criminal offense, 60 A.L.R.3d 1293](#)

[Attempts to commit offenses of larceny by trick, confidence game, false pretenses, and the like, 6 A.L.R.3d 241](#)

An attempt to commit a crime has occurred where an individual, with the intent to commit the crime, does an act which is a “substantial step” toward, and more than preparation for, the commission of the crime.<sup>1</sup> Specifically, attempted larceny by false pretenses requires a specific intent to commit the underlying offense, an overt act towards that commission, and a failure to complete the crime.<sup>2</sup> If the accused commits certain acts from which it may be reasonably inferred that the crime would have been committed but for some involuntary frustration, these acts may be deemed an attempt.<sup>3</sup>

The crime of attempting to obtain money or property by false pretenses is complete when a false representation is made with the requisite criminal intent under circumstances such that if the thing of value is obtained, a deprivation is the result.<sup>4</sup>

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#### Footnotes

<sup>1</sup> [State v. Ulvestad, 414 N.W.2d 737 \(Minn. Ct. App. 1987\); Com. v. Edwards, 399 Pa. Super. 545, 582 A.2d 1078 \(1990\).](#)

<sup>2</sup> [Com. v. Hyde, 88 Mass. App. Ct. 761, 42 N.E.3d 1171 \(2015\), review denied, 473 Mass. 1111, 48 N.E.3d 464 \(2016\) and review denied, 473 Mass. 1111, 48 N.E.3d 464 \(2016\).](#)

<sup>3</sup> [People v. Hagan, 199 Ill. App. 3d 267, 145 Ill. Dec. 322, 556 N.E.2d 1224 \(2d Dist. 1990\), judgment aff'd, 145 Ill. 2d](#)

287, 164 Ill. Dec. 578, 583 N.E.2d 494 (1991); *Houston v. State*, 528 N.E.2d 818 (Ind. Ct. App. 1988).  
As to attempts to commit crimes, generally, see Am. Jur. 2d, Criminal Law §§ 149 to 152.

<sup>4</sup> *Davidson v. State*, 305 Ark. 592, 810 S.W.2d 327 (1991); *Gore v. State*, 1987 OK CR 63, 735 P.2d 576 (Okla. Crim. App. 1987).

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## 32 Am. Jur. 2d False Pretenses § 47

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False Pretenses


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### III. Attempt to Commit Offense

## § 47. Knowledge of pretenses by victim; impossibility

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  21

The offense of attempting to obtain money or property by false pretenses may be committed even though the prosecuting witness knew the pretenses were false or did not rely on them.<sup>1</sup>

Legal impossibility is a defense to the crime of obtaining money or property by false pretenses, but it is not a defense to an attempt to commit the crime.<sup>2</sup> Attempted and completed thefts are legally and judicially treated as substantially equivalent in nature and seriousness.<sup>3</sup>

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### Footnotes

<sup>1</sup> Davidson v. State, 305 Ark. 592, 810 S.W.2d 327 (1991); State v. Mann, 244 N.J. Super. 622, 583 A.2d 372 (App. Div. 1990); Com. v. Imes, 424 Pa. Super. 633, 623 A.2d 859 (1993); State v. Doe, 825 P.2d 681 (Utah Ct. App. 1992). The fact that an undercover sergeant received a counterfeit handbag during a transaction with the defendant did not result in a completed offense of obtaining property by false pretenses, and thus the defendant's conviction for attempt to commit the offense was not precluded, where the sergeant was suspicious and had knowledge that the bag was likely counterfeit, so that the sergeant did not rely on any false pretense, as required for a completed offense. State v. Phillips, 797 S.E.2d 704 (N.C. Ct. App. 2017).

<sup>2</sup> State v. Stevens, 459 N.W.2d 513 (Minn. Ct. App. 1990).

<sup>3</sup> State v. Mann, 244 N.J. Super. 622, 583 A.2d 372 (App. Div. 1990).

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## 32 Am. Jur. 2d False Pretenses IV A Refs.

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False Pretenses

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### IV. Prosecutions

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## 32 Am. Jur. 2d False Pretenses § 48

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### False Pretenses

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#### IV. Prosecutions

##### A. Jurisdiction and Venue

### § 48. Venue in false pretenses prosecution, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

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Proper venue is an essential element in every criminal case.<sup>1</sup> The crime of making a false statement is a continuing offense that may be prosecuted in the district where the false statement is ultimately received for final decision making; the act of receiving a communication continues until the communication is received by the person or persons to whom it is intended to affect.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [People v. Flaherty](#), 165 Mich. App. 113, 418 N.W.2d 695 (1987) (overruled on other grounds by, [People v. Houthoofd](#), 487 Mich. 568, 790 N.W.2d 315 (2010)).

Venue could be laid in a district based upon the activities of an unindicted coconspirator where the defendant was fully apprised of the factual allegations supporting venue in that district including the allegation that an unnamed coconspirator submitted false verification in connection with the false statement provided by the defendant to a federally insured financial institution in that district, and thus there was no possibility for prejudicial surprise regarding the prosecution's ground for laying venue in the district. [U.S. v. Angotti](#), 105 F.3d 539 (9th Cir. 1997).

Venue was proper in a particular county in a prosecution for larceny by false pretense, where the motion judge found that many of the initial representations that the defendant made to the victim concerning a business enterprise for which he later obtained loans from her were made in that county during a five-month period when they were both serving as jurors in a mock trial program. [Com. v. Lewis](#), 48 Mass. App. Ct. 343, 720 N.E.2d 818 (1999).

As to venue in criminal cases, generally, see [Am. Jur. 2d, Criminal Law](#) §§ 451 to 491.

<sup>2</sup> [U.S. v. Angotti](#), 105 F.3d 539 (9th Cir. 1997) (in a prosecution for making false statements to a federally insured financial institution, action was properly venued in the district where the communications reached the audience whom it was intended to influence, the decision making home office of a federally insured financial institution, even though some of the criminal conduct occurred in another district where the statements were submitted).



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## 32 Am. Jur. 2d False Pretenses § 49

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### False Pretenses

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#### IV. Prosecutions

##### A. Jurisdiction and Venue

### § 49. Venue in false pretenses prosecution where property or money delivered to carrier or mailed

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#### West's Key Number Digest

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Where the victim of a false pretense sends property by mail to the accused in another jurisdiction, the venue is properly laid in the place where the property or money was delivered to the carrier or was mailed.<sup>1</sup>

Where an instrument in writing, such as a check or draft, is deposited in the mail in reliance on false pretenses, it is sometimes said that venue may be laid at the place where the instrument was mailed.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Updike v. People](#), 92 Colo. 125, 18 P.2d 472 (1933); [Bozarth v. State](#), 56 Okla. Crim. 424, 41 P.2d 924 (1934); [Com. v. Prep](#), 186 Pa. Super. 442, 142 A.2d 460 (1958).

<sup>2</sup> [Updike v. People](#), 92 Colo. 125, 18 P.2d 472 (1933).  
Defendant's act of passing a bad check occurred in Jackson County, when a defendant hand delivered an envelope containing the insufficient funds check to the payee's agent in exchange for a delivery of fuel, and thus, the evidence was sufficient to establish venue in Jackson County, even though the check was ultimately mailed to Hutchinson County, in a prosecution for grand theft by passing an insufficient funds check. [State v. Iwan](#), 2010 SD 92, 791 N.W.2d 788 (S.D. 2010).

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## 32 Am. Jur. 2d False Pretenses § 50

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False Pretenses

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### IV. Prosecutions

#### B. Indictment

## § 50. Indictment in false pretenses prosecution, generally; sufficiency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

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### A.L.R. Library

[False statement as to existing encumbrance on chattel in obtaining loan or credit as criminal false pretense, 53 A.L.R.2d 1215](#)

An indictment for obtaining property by false pretenses is sufficient if the language used is such that it designates the person charged and indicates to him or her the crime of which he or she is accused.<sup>1</sup> No averment in an indictment may be rejected as surplusage that is descriptive of either the offense or the manner in which it was committed.<sup>2</sup> An indictment for false pretenses must have that degree of certainty and precision which will fully inform the accused of the special character of the charge against which he or she is called on to defend, will enable the court to determine whether the facts alleged on the face of the indictment are sufficient in the contemplation of law to constitute a crime, and will stand as a protection against further prosecution for the same alleged offense.<sup>3</sup> It must aver all the material elements of the offense.<sup>4</sup> Specifically, to sustain a charge of obtaining property by false pretenses, the indictment must state the alleged false representation.<sup>5</sup> However, all executions of a fraudulent scheme need not be charged.<sup>6</sup> A valid indictment for the offense of obtaining property by false pretenses must also allege sufficient facts to show the existence of a causal connection between the false representation and the defendant's ability to obtain or the defendant's attempt to obtain property from another.<sup>7</sup> It is not necessary to allege specifically that the victim was in fact deceived by the false pretense when the facts alleged in the bill of indictment are sufficient to suggest that the surrender of something of value was the natural and probable result of the false pretense.<sup>8</sup> Additionally, an indictment for obtaining property by false pretenses need not allege the name of any particular victim because the statute governing the offense does not require that the state prove an intent to defraud any particular person.<sup>9</sup> It is, however, the general rule that the thing obtained must be described with reasonable certainty, and by the name or term usually employed to describe it.<sup>10</sup>

**Practice Tip:**

Allegations in the terms of the statute generally are sufficient.<sup>11</sup>

Where it is uncertain whether a defendant committed false pretenses or embezzlement, it is proper for an indictment to charge both, although the defendant cannot be convicted of both; the state does not have to choose between charges.<sup>12</sup> In an indictment alleging the issuance of worthless checks, it is not necessary to specify the entity in whose name the account is held, but if the indictment does so specify, the state must prove it.<sup>13</sup>

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Footnotes

- <sup>1</sup> [Arnold v. State](#), 210 Ga. App. 843, 437 S.E.2d 844 (1993); [State v. Jalbert](#), 161 Me. 505, 214 A.2d 819 (1965); [State v. Gellis](#), 158 S.C. 471, 155 S.E. 849 (1930).
- <sup>2</sup> [Farmer v. State](#), 208 Ga. App. 198, 430 S.E.2d 397 (1993).
- <sup>3</sup> [State v. Ainsworth](#), 528 So. 2d 599 (La. Ct. App. 2d Cir. 1988); [State v. O'Connell](#), 726 S.W.2d 742 (Mo. 1987); [State v. Gellis](#), 158 S.C. 471, 155 S.E. 849 (1930).  
Indictments for obtaining property by false pretenses, which stated that the defendant obtained money from an insurer through false representations she made by submitting fraudulent moving invoices which were intended to, and, in fact, did, deceive the insurer, were legally sufficient, although they did not specifically allege how, or in what manner, the invoices were fraudulent; it was clear that the false invoices the defendant submitted purporting to be from the moving companies formed the basis for the counts. [State v. Holanek](#), 776 S.E.2d 225 (N.C. Ct. App. 2015), review denied, 368 N.C. 429, 778 S.E.2d 95 (2015) and cert. denied, 136 S. Ct. 2493, 195 L. Ed. 2d 824 (2016).
- <sup>4</sup> [People v. Walther](#), 27 Cal. App. 2d 583, 81 P.2d 452 (3d Dist. 1938) (disapproved of on other grounds by, [People v. Dunn](#), 40 Cal. App. 2d 6, 104 P.2d 119 (3d Dist. 1940)); [Johnson v. People](#), 110 Colo. 283, 133 P.2d 789 (1943); [State v. O'Connell](#), 726 S.W.2d 742 (Mo. 1987); [Hale v. Burkhardt](#), 104 Nev. 632, 764 P.2d 866 (1988).  
Indictments for obtaining property by false pretenses were facially valid, where they provided the names of the elderly victims targeted by defendant, the monetary sums defendant took from the victims in overcharging for defendant's work, and the false representation used by defendant to convince the victims that their roofs needed extensive repairs when their roofs did not need repair at all. [State v. Barker](#), 240 N.C. App. 224, 770 S.E.2d 142 (2015).
- <sup>5</sup> [State v. Pendergraft](#), 238 N.C. App. 516, 767 S.E.2d 674 (2014), aff'd, 368 N.C. 314, 776 S.E.2d 679 (2015).  
As to false representation, generally, see §§ 10 to 24.
- <sup>6</sup> [U.S. v. Bajoghli](#), 785 F.3d 957, 97 Fed. R. Evid. Serv. 528 (4th Cir. 2015).
- <sup>7</sup> [State v. Pendergraft](#), 238 N.C. App. 516, 767 S.E.2d 674 (2014), aff'd, 368 N.C. 314, 776 S.E.2d 679 (2015).  
As to reliance, see §§ 42 to 45.
- <sup>8</sup> [State v. Pendergraft](#), 238 N.C. App. 516, 767 S.E.2d 674 (2014), aff'd, 368 N.C. 314, 776 S.E.2d 679 (2015).
- <sup>9</sup> [State v. Seelig](#), 226 N.C. App. 147, 738 S.E.2d 427 (2013).
- <sup>10</sup> [State v. Jones](#), 223 N.C. App. 487, 734 S.E.2d 617 (2012), decision aff'd, 367 N.C. 299, 758 S.E.2d 345 (2014).  
As to acquisition of something of value, see §§ 29 to 41.
- <sup>11</sup> [State v. O'Connell](#), 726 S.W.2d 742 (Mo. 1987); [State v. Fleming](#), 225 Mont. 48, 730 P.2d 1178 (1987).  
An indictment charging a defendant with theft by deception was not defective, since the indictment tracked the language of the statute as to the elements of the offense, and the indictment provided details required by the statute prohibiting theft by deception. [People v. Carlson](#), 72 P.3d 411 (Colo. App. 2003).

<sup>12</sup> [State v. Speckman](#), 326 N.C. 576, 391 S.E.2d 165 (1990).

<sup>13</sup> [State v. Pruitt](#), 178 W. Va. 147, 358 S.E.2d 231 (1987).  
As to offenses as to checks, see §§ [60](#) to [74](#).

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## 32 Am. Jur. 2d False Pretenses § 51

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### False Pretenses

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#### IV. Prosecutions

##### B. Indictment

## § 51. Variance between false pretenses indictment and proof

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### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  38

A variance occurs when the proof differs from the allegations in the indictment.<sup>1</sup> There is a fatal and reversible variance only if the defendant is not definitely informed of the charges against him or her and not protected from another prosecution for the same offense<sup>2</sup> or if the indictment is too confusing to permit the ascertainment of the basis of the defendant's conviction.<sup>3</sup> Anything less than this does not create a fatal variance.<sup>4</sup> With regard to the offense of obtaining property by false pretenses, the state must prove, as an essential element of the crime, that the defendant made the misrepresentation as alleged, and if the state's evidence fails to establish that defendant made this misrepresentation but tends to show some other misrepresentation was made, then the state's proof varies fatally from the indictments.<sup>5</sup> However, allegations of an indictment charging a defendant with obtaining property by false pretenses does not fatally vary from evidence produced at trial, even if the name of the victim alleged in the indictment is different than the name of the victim proved at trial, since the name of the particular victim is not a necessary element of the offense.<sup>6</sup>

There is no fatal variance where the indictment in a false pretenses prosecution uses the term "lawful currency," but the actual payment made in reliance on the false pretenses was in the form of a check.<sup>7</sup>

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#### Footnotes

<sup>1</sup> [U.S. v. Vavlitis](#), 9 F.3d 206 (1st Cir. 1993).

<sup>2</sup> [Arnold v. State](#), 210 Ga. App. 843, 437 S.E.2d 844 (1993).

<sup>3</sup> [Gentry v. State](#), 202 Ga. App. 465, 414 S.E.2d 696 (1992).

<sup>4</sup> [U.S. v. Vavlitis](#), 9 F.3d 206 (1st Cir. 1993); [Farmer v. State](#), 208 Ga. App. 198, 430 S.E.2d 397 (1993); [State v. Clemmons](#), 111 N.C. App. 569, 433 S.E.2d 748 (1993).

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<sup>5</sup> [State v. Holanek](#), 776 S.E.2d 225 (N.C. Ct. App. 2015), review denied, [368 N.C. 429](#), 778 S.E.2d 95 (2015) and cert. denied, 136 S. Ct. 2493, 195 L. Ed. 2d 824 (2016).

<sup>6</sup> [State v. Seelig](#), 226 N.C. App. 147, 738 S.E.2d 427 (2013).

<sup>7</sup> [Arnold v. State](#), 210 Ga. App. 843, 437 S.E.2d 844 (1993).

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## 32 Am. Jur. 2d False Pretenses § 52

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False Pretenses

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### IV. Prosecutions

#### B. Indictment

## § 52. Amendment of indictment for false pretenses

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  25.1

An amendment to an indictment occurs when charging terms of the indictment are altered after the grand jury had passed on upon them.<sup>1</sup> Where only one paragraph of the indictment is changed from stating the amount of money obtained by the defendant to the ultimate net loss of the victim, the defendant is still well informed of the charges on which he or she has been arraigned and ultimately convicted, and the amendment is not prejudicial.<sup>2</sup>

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### Footnotes

<sup>1</sup> [U.S. v. Vavlitis, 9 F.3d 206 \(1st Cir. 1993\).](#)

<sup>2</sup> [U.S. v. Vavlitis, 9 F.3d 206 \(1st Cir. 1993\).](#)

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## 32 Am. Jur. 2d False Pretenses § 53

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### IV. Prosecutions

#### B. Indictment

## § 53. Aggregation in indictment of amounts obtained through schemes to defraud

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  25.1, 32, 37

### A.L.R. Library

[Series of takings over a period of time as involving single or separate larcenies](#), 53 A.L.R.3d 398

If the defendant engaged in a scheme of deception, the separate amounts of separate things of value obtained by him or her may be aggregated to reach a statutorily prescribed threshold for conviction of theft by deception.<sup>1</sup> Aggregation as the result of such a scheme requires a single criminal intent and that each theft be part of a general larcenous course of conduct.<sup>2</sup>

The amounts of things of value obtained by completed thefts by deception and attempted thefts by deception may also be aggregated for the purpose of grading the offense.<sup>3</sup>

Some jurisdictions have enacted statutes designed to reach deceptive schemes where many victims each lose small amounts of money; such statutes shift from the traditional focus on the amount of the injury to the nature and breadth of the scheme.<sup>4</sup> Some jurisdictions have enacted statutes whereby issuing a series of bad checks within a prescribed period of time constitutes a scheme.<sup>5</sup> Issuing bad checks pursuant to such a scheme may subject the accused to more severe penalties.<sup>6</sup>

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### Footnotes

<sup>1</sup> [U.S. v. Picquet](#), 963 F.2d 54 (5th Cir. 1992); [U.S. v. Iredia](#), 866 F.2d 114, 27 Fed. R. Evid. Serv. 642 (5th Cir. 1989); [U.S. v. Farkas](#), 935 F.2d 962, 33 Fed. R. Evid. Serv. 237, 115 A.L.R. Fed. 681 (8th Cir. 1991); [U.S. v. Russell](#), 908 F.2d 405 (8th Cir. 1990); [U.S. v. Ryan](#), 894 F.2d 355 (10th Cir. 1990); [Smith v. Com.](#), 818 S.W.2d 620 (Ky. Ct. App.

1991).

The fact that the State did not present all of the defendant's applications or worksheets did not change the fact that the defendant committed the offense of theft in the aggregate, stemming from her applications for and receipt of food stamps. *Terry v. State*, 397 S.W.3d 823 (Tex. App. Houston 14th Dist. 2013).

<sup>2</sup> *Ryans v. State*, 518 N.E.2d 494 (Ind. Ct. App. 1988); *Smith v. Com.*, 818 S.W.2d 620 (Ky. Ct. App. 1991); *People v. Harajli*, 161 Mich. App. 399, 411 N.W.2d 765 (1987); *State v. Childs*, 242 N.J. Super. 121, 576 A.2d 42 (App. Div. 1990).

Money received by defendants from an adoption agency could not be aggregated with an amount less than \$10,000 received from other prospective adoptive parents who were not aware that the defendants were also working with the adoption agency, in order to elevate theft by deception between \$500 and \$10,000 to a class C felony theft by deception over \$10,000. *Commonwealth v. Young*, 487 S.W.3d 430 (Ky. 2015), as modified, (May 5, 2016).

<sup>3</sup> *State v. Clough*, 171 Ariz. 217, 829 P.2d 1263 (Ct. App. Div. 1 1992); *Commonwealth v. Young*, 487 S.W.3d 430 (Ky. 2015), as modified, (May 5, 2016); *State v. Fournier*, 617 A.2d 998 (Me. 1992); *State v. Mann*, 244 N.J. Super. 622, 583 A.2d 372 (App. Div. 1990).

<sup>4</sup> *People v. Mikuszewski*, 73 N.Y.2d 407, 541 N.Y.S.2d 196, 538 N.E.2d 1017 (1989).

<sup>5</sup> *State v. Clough*, 171 Ariz. 217, 829 P.2d 1263 (Ct. App. Div. 1 1992); *State v. Thomas*, 552 So. 2d 777 (La. Ct. App. 1st Cir. 1989).

As to offenses as to checks, see §§ 60 to 74.

<sup>6</sup> *State v. Clough*, 171 Ariz. 217, 829 P.2d 1263 (Ct. App. Div. 1 1992); *State v. Fleming*, 225 Mont. 48, 730 P.2d 1178 (1987).

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## 32 Am. Jur. 2d False Pretenses § 54

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### IV. Prosecutions

#### C. Evidence and Proof

## § 54. Burden of proof in false pretenses prosecution

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  39 to 49(6)

The government has the burden, in a prosecution for obtaining property by false pretenses, of proving the pretense, defendant knew or believed that the statement was false when he made it, the fraudulent intent, the reliance on the false pretenses by the deceived, and the fact that the property was obtained by such false pretense.<sup>1</sup>

The burden of proof is on the state to show beyond a reasonable doubt that a false representation was made with regard to an existing fact.<sup>2</sup>

However, in a prosecution for false pretenses, the state does not have the burden to prove that the defendant intended to permanently deprive a person of his or her property.<sup>3</sup>

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### Footnotes

<sup>1</sup> Nelson v. U.S., 227 F.2d 21, 53 A.L.R.2d 1206 (D.C. Cir. 1955); Com. v. McCauliff, 461 Mass. 635, 963 N.E.2d 719 (2012); Martin v. State, 87 So. 3d 1145 (Miss. Ct. App. 2012); Pettijohn v. State, 148 Neb. 336, 27 N.W.2d 380 (1947); Gorka v. State, 107 Nev. 851, 822 P.2d 111 (1991).

The State must prove, as an essential element of the crime of obtaining property by false pretense, that defendant made the misrepresentation as alleged. State v. Barker, 240 N.C. App. 224, 770 S.E.2d 142 (2015).

In a prosecution for obtaining a mortgage by false pretenses, the State has the burden of proving the victim relied on the defendant's misrepresentation and was deceived by it. Izquierdo v. State, 177 So. 3d 1018 (Fla. 3d DCA 2015), review denied, 192 So. 3d 38 (Fla. 2015).

As to false representation, generally, see §§ 10 to 24.

As to knowledge and design of statement, generally, see §§ 25 to 28.

As to acquisition of something of value, see §§ 29 to 41.

As to reliance, see §§ 42 to 45.

<sup>2</sup> Cooper v. State, 68 So. 3d 741 (Miss. Ct. App. 2011).

To support a conviction for larceny by false pretenses, the Commonwealth must prove that the pretenses employed were in fact false. [Reid v. Com., 65 Va. App. 745, 781 S.E.2d 373 \(2016\)](#).

<sup>3</sup> [State v. Letts, 986 A.2d 1006 \(R.I. 2010\)](#).

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## 32 Am. Jur. 2d False Pretenses § 55

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### IV. Prosecutions

#### C. Evidence and Proof

## § 55. Proof of intent and knowledge in false pretenses prosecution

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  39, 42, 49(1), 49(2), 49(4)

### A.L.R. Library

[Admissibility on behalf of accused of evidence of similar acts or transactions tending to rebut fraudulent intent, 90 A.L.R.2d 903](#)

[Admissibility to establish fraudulent purpose or intent, in prosecution for obtaining or attempting to obtain money or property by false pretenses, of evidence of similar attempts on other occasions, 78 A.L.R.2d 1359](#)

In a prosecution for obtaining property or money by false pretenses, an intent on the part of the accused to defraud must be established,<sup>1</sup> and a wide latitude of proof is permitted for this purpose.<sup>2</sup> Intent to defraud, for purposes of false pretenses, can be inferred<sup>3</sup> from a series of acts and pertinent circumstances<sup>4</sup> to include acts occurring subsequent to the commission of the alleged crime.<sup>5</sup> Some courts have recognized that an intent to defraud may also be inferred from the false representations.<sup>6</sup> Evidence of the defendant's financial difficulties may be admitted as relevant to the question of intent.<sup>7</sup> Although actual deprivation to the owner is one circumstance from which the jury may infer in a prosecution for theft by deception that the offender committed the prohibited act with the requisite criminal intent to deprive the owner of property, the theft statute does not require that exact proof.<sup>8</sup> Since intent is an internal and invisible act or resolution of the mind and can be ascertained and judged only by external and visible acts, and by the surrounding circumstances of which a person had knowledge when the alleged criminal act was committed, it may be proven by circumstantial evidence.<sup>9</sup>

Evidence of similar false representations made by the accused at about the time of the offense charged generally is admissible to prove a fraudulent intent.<sup>10</sup>

In order to successfully assert an "honest belief" or "claim of right" defense,<sup>11</sup> a defendant must offer evidence as to his or her state of mind and the basis therefor.<sup>12</sup> However, the court and jury are not bound by the defendant's own evidence of what his

or her intent was.<sup>13</sup>

While deception as to a person's present intention to perform a promise may be the basis of a conviction of larceny by false pretenses, such deception cannot be inferred from the mere nonperformance of the promise;<sup>14</sup> therefore, courts must look to see what evidence, other than the defendant's failure to perform, was elicited to show that he anticipated that he would not perform his promise.<sup>15</sup>

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#### Footnotes

- <sup>1</sup> § 26.
- <sup>2</sup> U.S. v. Whaley, 786 F.2d 1229, 20 Fed. R. Evid. Serv. 668 (4th Cir. 1986); Mughrabi v. Com., 38 Va. App. 538, 567 S.E.2d 542 (2002); State v. Cooke, 59 Wash. 2d 804, 371 P.2d 39, 94 A.L.R.2d 564 (1962).
- <sup>3</sup> State v. Letts, 986 A.2d 1006 (R.I. 2010).
- <sup>4</sup> People v. Witek, 97 P.3d 240 (Colo. App. 2004); Dennon v. Com., 63 Va. App. 139, 754 S.E.2d 913 (2014) (conduct and representations of the defendant); State v. Baldwin, 111 Wash. App. 631, 45 P.3d 1093 (Div. 1 2002), aff'd, 150 Wash. 2d 448, 78 P.3d 1005 (2003).
- <sup>5</sup> State v. Manion, 442 Md. 419, 112 A.3d 506 (2015).
- <sup>6</sup> State v. Monroe, 83 N.C. App. 143, 349 S.E.2d 315 (1986); Rader v. Com., 15 Va. App. 325, 423 S.E.2d 207 (1992); State v. Peterson, 190 Wash. 668, 70 P.2d 306 (1937).
- <sup>7</sup> U.S. v. Metallo, 908 F.2d 795, 30 Fed. R. Evid. Serv. 1209 (11th Cir. 1990); State v. Muzio, 105 N.M. 352, 1987-NMCA-006, 732 P.2d 879 (Ct. App. 1987); State v. Stanton, 68 Wash. App. 855, 845 P.2d 1365 (Div. 2 1993).
- <sup>8</sup> Hobby v. State, 436 Md. 526, 83 A.3d 794 (2014).
- <sup>9</sup> U.S. v. Vavlitis, 9 F.3d 206 (1st Cir. 1993); Baker v. State, 588 So. 2d 945 (Ala. Crim. App. 1991); Johnson v. State, 593 N.E.2d 208 (Ind. Ct. App. 1992); Mississippi State Bd. of Nursing v. Wilson, 624 So. 2d 485 (Miss. 1993); State v. Turnbough, 876 S.W.2d 19 (Mo. Ct. App. E.D. 1994); State v. Reed, 228 Neb. 645, 423 N.W.2d 777 (1988); Wynne v. Com., 18 Va. App. 459, 445 S.E.2d 160 (1994).
- <sup>10</sup> U.S. v. Lutz, 621 F.2d 940, 6 Fed. R. Evid. Serv. 283 (9th Cir. 1980); Saffold v. State, 494 So. 2d 164 (Ala. Crim. App. 1986); Semones v. Southern Bell Tel. & Tel. Co., 106 N.C. App. 334, 416 S.E.2d 909 (1992).
- <sup>11</sup> § 27.
- <sup>12</sup> Fraidin v. State, 85 Md. App. 231, 583 A.2d 1065 (1991); State v. Kramer, 809 S.W.2d 50 (Mo. Ct. App. E.D. 1991).
- <sup>13</sup> Mississippi State Bd. of Nursing v. Wilson, 624 So. 2d 485 (Miss. 1993); State v. Kramer, 809 S.W.2d 50 (Mo. Ct. App. E.D. 1991).
- <sup>14</sup> Com. v. Long, 90 Mass. App. Ct. 696, 63 N.E.3d 1123 (2016); People v. Abeel, 67 A.D.3d 1408, 888 N.Y.S.2d 696 (4th Dep't 2009).
- <sup>15</sup> Com. v. Long, 90 Mass. App. Ct. 696, 63 N.E.3d 1123 (2016).



## 32 Am. Jur. 2d False Pretenses § 56

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### False Pretenses

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#### IV. Prosecutions

##### C. Evidence and Proof

### § 56. Reliance of victim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  39, 49(1), 49(5)

In a prosecution for obtaining property by false pretenses, the reliance of the victim upon the false representation may be inferred from all the circumstances,<sup>1</sup> and it is competent to prove by the direct testimony of the prosecuting witness that he or she was induced to part with his or her property by the representations of the accused.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [People v. Miller](#), 81 Cal. App. 4th 1427, 97 Cal. Rptr. 2d 684 (6th Dist. 2000), as modified on denial of reh'g, (July 6, 2000).

Conviction of obtaining a mortgage by false pretenses was supported by evidence that the mortgagee relied on the defendant's false representations regarding an unsecured note in a Housing and Urban Development (HUD) statement provided to the mortgagee and that the money was disbursed to the defendant on the basis of false statements in a HUD statement. [Izquierdo v. State](#), 177 So. 3d 1018 (Fla. 3d DCA 2015), review denied, 192 So. 3d 38 (Fla. 2015).

Evidence was insufficient to establish that the seller relied on any of the defendant's misrepresentations relating to the mortgage or note, thus precluding conviction for mortgage fraud; all the misrepresentations made concerning the mortgage loan were made to the lender or its agents, not the seller, there was no evidence that the seller saw the mortgage documents or relied on the false or fraudulent misrepresentations made concerning the mortgage in selling the property. [Grant v. State](#), 43 So. 3d 864 (Fla. 5th DCA 2010), cause dismissed, 48 So. 3d 836 (Fla. 2010).

As to reliance, see §§ 42 to 45.

<sup>2</sup> [Com. v. Quartapella](#), 372 Pa. Super. 400, 539 A.2d 855 (1988).



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### IV. Prosecutions

#### C. Evidence and Proof

## § 57. Proof of value of victim's loss in false pretenses prosecution

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### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  49(1), 49(2)

There is authority to the effect that the value of the loss that needs to be proven by the state for purposes of grading the offense is the market value, in other words, the price obtainable for the property offered in the marketplace at the time and place where the property was criminally appropriated.<sup>1</sup> However, there is also authority that the highest value by any reasonable standard should be used, not necessarily the market value<sup>2</sup> or that the loss intended by the defendant, if it can be determined, if greater than the victim's actual loss, should be used.<sup>3</sup>

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### Footnotes

<sup>1</sup> [State v. Roche, Inc.](#), 2 Neb. App. 445, 511 N.W.2d 195 (1994), judgment rev'd on other grounds, 246 Neb. 568, 520 N.W.2d 539 (1994).

Defendant's convictions of grand theft by false pretenses and unlawful diversion of funds received for construction improvements, based on the defendant's misuse of funds paid for a fire protection system maintenance project, were not subject to a sentence enhancement for a loss exceeding \$65,000, absent evidence that the \$82,000 that the victim paid the defendant for the fire protection system maintenance project exceeded the fair market value of the services defendant provided by at least \$65,000. [People v. Williams](#), 218 Cal. App. 4th 1038, 160 Cal. Rptr. 3d 779 (5th Dist. 2013).

<sup>2</sup> [State v. Enszt](#), 503 N.W.2d 236 (N.D. 1993).

<sup>3</sup> [U.S. v. Brown](#), 7 F.3d 1155 (5th Cir. 1993).



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### Research References

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A.L.R. Index, Tricks and Trickery

West's A.L.R. Digest, [False Pretenses](#) 🔑 50 to 54

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## 32 Am. Jur. 2d False Pretenses § 58

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IV. Prosecutions

D. Instructions

### § 58. Instructions in false pretenses prosecution, generally; intent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  50 to 54

Jury instructions must be viewed in their entirety to determine whether they fairly and adequately explain the law of the case.<sup>1</sup> One instruction setting forth the elements of the offense of false pretenses and a second instruction defining the necessary intent to defraud are sufficient to adequately instruct the jury on the elements of the offense.<sup>2</sup>

Whether particular conduct by an individual defendant gives rise to an inference of intent to defraud is a question for the jury to resolve in a prosecution for grand larceny.<sup>3</sup>

Under a statute authorizing a conviction for grand theft by false pretenses when the pretense is accompanied by a “false token or writing,” the pretense must have been accompanied by a false token or a false writing; a pattern jury instruction is incorrect in stating it is sufficient if the pretense is accompanied by “a writing.”<sup>4</sup>

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#### Footnotes

<sup>1</sup> [State v. Saybolt](#), 461 N.W.2d 729 (Minn. Ct. App. 1990); [State v. Hines](#), 54 N.C. App. 529, 284 S.E.2d 164 (1981). Proposed instruction stating that a defendant temporarily deposited funds he took from the victim’s individual retirement account (IRA) into a joint checking account he shared with the victim was not relevant to the charge of false pretenses, and thus the instruction was not warranted; the issue was not whether the money in the account was jointly owned, but whether the defendant used false pretenses to convince the victim to allow him to withdraw funds from the IRA. [Butt v. State](#), 986 So. 2d 981 (Miss. Ct. App. 2007).

<sup>2</sup> [Barron v. State](#), 105 Nev. 767, 783 P.2d 444 (1989). As to knowledge and design of statement, generally, see §§ 25 to 28.

<sup>3</sup> [People v. Sala](#), 258 A.D.2d 182, 695 N.Y.S.2d 169 (3d Dep’t 1999), order aff’d, 95 N.Y.2d 254, 716 N.Y.S.2d 361, 739 N.E.2d 727 (2000). Jury was sufficiently instructed to be able to convict a defendant of obtaining merchandise valued at \$100 or more

under false pretenses; the instruction charged the jury to find the defendant guilty if it believed that he did with fraudulent intent unlawfully, willfully and feloniously issue a check knowing he did not have sufficient funds on deposit with bank for payment of the check, the difference at issue between the instruction and the indictment was that words, “did not have sufficient funds” replaced indictment wording “did not have an account in said bank,” but both phrases were indicative of essentially the same meaning, while the defendant originally had account at bank, it was closed due to insufficient funds prior to writing check, so the defendant had neither an account nor sufficient funds when he issued the check at a liquor store. [Lyles v. State, 12 So. 3d 532 \(Miss. Ct. App. 2009\)](#).

<sup>4</sup> [People v. Henning, 173 Cal. App. 4th 632, 92 Cal. Rptr. 3d 775 \(3d Dist. 2009\)](#).

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## 32 Am. Jur. 2d False Pretenses § 59

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IV. Prosecutions

D. Instructions

### § 59. Proof as to obtaining property in false pretenses prosecution; misrepresentation

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#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  50 to 54

A jury instruction for obtaining property by false pretenses does not need to contain the specific misrepresentations alleged in the indictments<sup>1</sup> and a jury instruction that is not specific to the misrepresentation in the indictment charging the defendant with attempt to obtain property by false pretenses is acceptable so long as the court finds no fatal variance between the indictment, the proof presented at trial, and the instructions to the jury.<sup>2</sup>

#### CUMULATIVE SUPPLEMENT

##### Cases:

Trial court properly charged jury on larceny by false pretenses, where standard charge contained in Criminal Jury Instructions was sufficient to convey requirement that defendant obtained public benefit to which he was not entitled, and trial court was not obligated to include additional language requested by defendant. [People v. Hurley](#), 161 A.D.3d 687, 78 N.Y.S.3d 74 (1st Dep't 2018).

#### [END OF SUPPLEMENT]

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##### Footnotes

<sup>1</sup> [State v. Barker](#), 240 N.C. App. 224, 770 S.E.2d 142 (2015).  
As to false representation, generally, see §§ 10 to 24.



<sup>2</sup> [State v. Ledwell, 171 N.C. App. 314, 614 S.E.2d 562 \(2005\).](#)  
As to variance, see § 51.

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## 32 Am. Jur. 2d False Pretenses V A Refs.

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V. Offenses as to Checks

A. Issuing Check Without Sufficient Funds

[Topic Summary](#) | [Correlation Table](#)

### Research References

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West's Key Number Digest, [False Pretenses](#)  15, 20

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## 32 Am. Jur. 2d False Pretenses § 60

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### V. Offenses as to Checks

#### A. Issuing Check Without Sufficient Funds

## § 60. “Bad check” statutes

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### West’s Key Number Digest

West’s Key Number Digest, [False Pretenses](#)  15, 20

### A.L.R. Library

[Reasonable expectation of payment as affecting offense under “worthless check” statutes, 9 A.L.R.3d 719](#)

[Criminal liability of corporate officer who issues worthless checks in corporate name, 68 A.L.R.2d 1269](#)

State statutory law commonly prohibits the obtaining of money or property by means of checks or drafts issued without sufficient funds or credit.<sup>1</sup>

The essence of the crime of passing bad checks is to prohibit anyone from issuing or transferring a check to obtain money or property when that individual knows that the check is worthless.<sup>2</sup> However, a statute setting forth the crime of passing worthless checks does not criminalize an honest mistake.<sup>3</sup>

Giving a worthless check within a certain period after prior convictions or giving two or more worthless checks in one day may violate a statute that criminalizes habitually giving worthless checks.<sup>4</sup> However, a defendant’s offenses of writing bad checks on two separate occasions to the same business owner may be found not to be part of a single scheme or plan, such that the offenses are “related” for purposes of a sentencing guideline providing that prior sentences imposed in unrelated cases are to be counted separately in computing criminal history.<sup>5</sup>

### Observation:

The purpose of the offense of passing bad checks is not to punish forgery or the alteration of genuine checks; rather, it is to punish

the issuance of checks that are bogus or worthless because there are no funds available to pay them.<sup>6</sup>

A check must be a “check” as defined by statute in order to support a check fraud conviction.<sup>7</sup>

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#### Footnotes

- <sup>1</sup> [Sherman v. State](#), 255 So. 2d 263 (Fla. 1971); [People v. Dennis](#), 43 Ill. App. 3d 518, 2 Ill. Dec. 396, 357 N.E.2d 563 (1st Dist. 1976); [State v. Davis](#), 134 So. 3d 1257 (La. Ct. App. 2d Cir. 2014); [State v. Schouweiler](#), 887 N.W.2d 22 (Minn. 2016); [Zahavi v. State](#), 343 P.3d 595, 131 Nev. Adv. Op. No. 7 (Nev. 2015), cert. denied, 136 S. Ct. 110, 193 L. Ed. 2d 89 (2015); [State v. Russell](#), 382 S.W.3d 312 (Tenn. 2012).
- <sup>2</sup> [State v. Terry](#), 186 Ohio App. 3d 670, 2010-Ohio-1604, 929 N.E.2d 1111, 72 U.C.C. Rep. Serv. 2d 60 (4th Dist. Athens County 2010).
- <sup>3</sup> [State v. Russell](#), 382 S.W.3d 312 (Tenn. 2012).  
As to intent to defraud with a check, generally, see §§ 63, 64.
- <sup>4</sup> [State v. Walden](#), 208 Kan. 163, 490 P.2d 370 (1971).
- <sup>5</sup> [U.S. v. Rosche](#), 239 F. Supp. 2d 858 (E.D. Wis. 2002) (there was no evidence that the two offenses were jointly planned, as opposed to merely being repeated, and the commission of one did not necessarily entail the commission of a second).
- <sup>6</sup> [State v. Terry](#), 186 Ohio App. 3d 670, 2010-Ohio-1604, 929 N.E.2d 1111, 72 U.C.C. Rep. Serv. 2d 60 (4th Dist. Athens County 2010).  
As to distinction between forgery and false pretenses, generally, see § 5.
- <sup>7</sup> [Rodgers v. State](#), 2011 WY 158, 265 P.3d 235 (Wyo. 2011) (evidence was insufficient to support a defendant’s conviction for check fraud where the “check” that the defendant requested from a convenience store clerk was not a “check” as defined by the check fraud statute, which defined a “check,” in part, as a “written unconditional order to pay a sum certain” in that the “check” defendant requested clearly stated on its face “do not cash without calling,” and that the “check” stated that it was invalid and would not be honored without obtaining an authorization number before cashing, which required contacting private company that issued the “check,” and, thus, the “check” was not an “unconditional order to pay,” and defendant was not the “drawer” of the check, in that his name did not appear on the “check” as the primary obligor).

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#### V. Offenses as to Checks

##### A. Issuing Check Without Sufficient Funds

### § 61. Constitutionality of bad check statutes; equal protection

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#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  15, 20

#### A.L.R. Library

[Constitutionality of "bad check" statute](#), 16 A.L.R.4th 631

[Application of "bad check" statute with respect to postdated checks](#), 52 A.L.R.3d 464

[Reasonable expectation of payment as affecting offense under "worthless check" statutes](#), 9 A.L.R.3d 719

A "bad check" statute violates the Equal Protection clause of the Fourteenth Amendment if the bank is given the discretion to create criminal liability by refusing to honor a check drawn upon it for which there are insufficient funds,<sup>1</sup> or if the statute effectively criminalizes the mere failure to pay.<sup>2</sup> The standard practice of levying a fine plus restitution charge in order to nolle prosequere a false pretense prosecution under a bad check law violates an indigent defendant's equal protection rights, as the amount is due immediately and there is no determination of a defendant's ability to pay, and thus a defendant unable to pay will be in the position of facing a felony conviction and jail time, while those with adequate resources will not; the automatic nature of the fine is what makes it discriminating to the poor.<sup>3</sup> Other authority provides, however, that a prosecutor has the discretion not to charge a person with issuing worthless checks if the person makes payment within a grace period.<sup>4</sup>

A statute imposing a more severe penalty for larceny by check than for larceny by use of credit cards does not violate Equal Protection under the Federal Constitution or a state constitution.<sup>5</sup> Similarly, a defendant, who is charged with issuing dishonored checks, which is a lesser-included offense of theft-by-check, is not similarly situated to a defendant who committed theft-by-check and, thus, a disparity in the severity of punishment between the two offenses, with a theft-by-check with a value of more than \$500 being a gross misdemeanor, and issuing dishonored checks with a value of more than \$500 being a felony, does not violate a defendant's right to equal protection.<sup>6</sup>

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Footnotes

- <sup>1</sup> People v. Quinn, 190 Colo. 534, 549 P.2d 1332 (1976).
- <sup>2</sup> State v. Ohnstad, 392 N.W.2d 389 (N.D. 1986).
- <sup>3</sup> Moody v. State, 716 So. 2d 562 (Miss. 1998).
- <sup>4</sup> Locklear v. State, 86 Wis. 2d 603, 273 N.W.2d 334 (1979).
- <sup>5</sup> State v. Perrigoue, 81 Wash. 2d 640, 503 P.2d 1063 (1972).
- <sup>6</sup> State v. Cox, 798 N.W.2d 517 (Minn. 2011).

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## 32 Am. Jur. 2d False Pretenses § 62

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### V. Offenses as to Checks

#### A. Issuing Check Without Sufficient Funds

## § 62. Absence or insufficiency of funds or credit as element of passing bad check

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  15

An essential element of an offense under “worthless check” statutes is the absence or insufficiency of funds in, or credit with, the bank on which the check is drawn<sup>1</sup> at the time of presentation of the check.<sup>2</sup> If the drawer has sufficient funds in the bank to cover a check when issuing it, he or she may nevertheless be guilty under a worthless check statute, if, due to other outstanding checks, the funds or credit with the bank are insufficient for payment of the check at the time it is presented for payment.<sup>3</sup> However, it is not unlawful under a bad check statute for an individual to close an account or to stop payment on a check when a dispute develops between the individual and the recipient regarding the goods or services rendered by the latter.<sup>4</sup>

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### Footnotes

<sup>1</sup> State v. Thompson, 1933-NMSC-021, 37 N.M. 229, 20 P.2d 1030 (1933); State v. Banks, 206 N.C. 479, 174 S.E. 306 (1934); Kilgore v. State, 25 Okla. Crim. 69, 219 P. 160 (1923); State v. Mondry, 48 S.D. 189, 203 N.W. 468 (1925).

<sup>2</sup> State v. Taylor, 335 Mo. 460, 73 S.W.2d 378, 95 A.L.R. 476 (1934); State v. De Nicola, 163 Ohio St. 140, 56 Ohio Op. 185, 126 N.E.2d 62 (1955).

<sup>3</sup> People v. Cundiff, 16 Ill. App. 3d 267, 305 N.E.2d 735 (3d Dist. 1973); State v. Taylor, 335 Mo. 460, 73 S.W.2d 378, 95 A.L.R. 476 (1934).

<sup>4</sup> Greenberg v. Prysizlak, 426 N.J. Super. 591, 46 A.3d 591 (App. Div. 2012).





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### False Pretenses

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#### V. Offenses as to Checks

##### A. Issuing Check Without Sufficient Funds

### § 63. Intent to defraud as element of passing bad check; drawer's knowledge of insufficient funds

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#### West's Key Number Digest

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#### A.L.R. Library

[Application of "bad check" statute with respect to postdated checks, 52 A.L.R.3d 464](#)

[Reasonable expectation of payment as affecting offense under "worthless check" statutes, 9 A.L.R.3d 719](#)

In order to be convicted under a "worthless check" statute, the defendant, when giving the check, must have known of the insufficiency of the funds and the absence of bank credit that would meet the check in full on its presentation.<sup>1</sup> The jury must be convinced that the defendant intended, at the time he or she issued the check, that payment would be refused when the payee presented the check to the drawee.<sup>2</sup>

It has been held, however, that the criminal offense of obtaining property in return for a worthless check does not require an intent to defraud, but merely requires a knowledge of insufficient funds on deposit in the bank on which the check is drawn.<sup>3</sup> For purposes of establishing the knowledge element of the offense of issuing a worthless check, the proper inquiry is whether a defendant knew that he had not sufficient credit with the bank, not whether his actual monetary balance was sufficient to cover a check, draft or order for payment issued by him.<sup>4</sup> However, the presence of sufficient funds in a defendant's checking account at the time she handed checks to merchants in payment for merchandise, while a factor indicating lack of intent to defraud, is not dispositive of the issue of the defendant's intent at the time she presented the checks to obtain merchandise.<sup>5</sup>

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#### Footnotes

- <sup>1</sup> People v. Bercovitz, 163 Cal. 636, 126 P. 479 (1912); State v. Kulow, 255 Iowa 789, 123 N.W.2d 872, 16 A.L.R.3d 1085 (1963).  
The statute requires an individual to know at the time there are not sufficient funds on deposit for the payment in full of the check. State v. Russell, 382 S.W.3d 312 (Tenn. 2012).
- <sup>2</sup> Albertson v. State, 212 Md. App. 531, 69 A.3d 1186 (2013).
- <sup>3</sup> State v. Berry, 358 So. 2d 545 (Fla. 1978).
- <sup>4</sup> State v. Davis, 134 So. 3d 1257 (La. Ct. App. 2d Cir. 2014).
- <sup>5</sup> Austin v. Com., 60 Va. App. 60, 723 S.E.2d 633 (2012).

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## 32 Am. Jur. 2d False Pretenses § 64

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#### V. Offenses as to Checks

##### A. Issuing Check Without Sufficient Funds

### § 64. Intent to defraud as element of passing bad check; drawer's knowledge of insufficient funds—Reasonable expectation of payment on presentation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  15

#### A.L.R. Library

[Reasonable expectation of payment as affecting offense under “worthless check” statutes, 9 A.L.R.3d 719](#)

Generally, a reasonable expectation of payment is a defense to a charge of issuing checks without sufficient funds.<sup>1</sup> If such an expectation is present, the act lacks the essential element of criminal intent.<sup>2</sup> However, a defendant must show a reasonable belief that the check would be paid on presentation in due course and not at some indefinite future time.<sup>3</sup>

#### Reminder:

A statute setting forth the crime of passing worthless checks does not criminalize an honest mistake.<sup>4</sup>

<sup>1</sup> State v. Stemen, 90 Ohio App. 309, 47 Ohio Op. 422, 106 N.E.2d 662 (2d Dist. Darke County 1951).

<sup>2</sup> State v. Daymus, 90 Ariz. 294, 367 P.2d 647 (1961); Mortensen v. State, 214 Ark. 528, 217 S.W.2d 325 (1949); State v. Stemen, 90 Ohio App. 309, 47 Ohio Op. 422, 106 N.E.2d 662 (2d Dist. Darke County 1951); Coffee v. State, 148 Tex. Crim. 71, 184 S.W.2d 278 (1944).

<sup>3</sup> State v. Daymus, 90 Ariz. 294, 367 P.2d 647 (1961).

<sup>4</sup> § 60.

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## 32 Am. Jur. 2d False Pretenses § 65

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### False Pretenses

Lucas Martin, J.D.


#### V. Offenses as to Checks

##### A. Issuing Check Without Sufficient Funds

### § 65. Worthless check given in exchange for property; check given for preexisting debt

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  15, 20

#### A.L.R. Library

[Construction and effect of "bad check" statute with respect to check in payment of pre-existing debt, 59 A.L.R.2d 1159](#)

The offense under a "worthless check" statute may require that the defendant obtain property in exchange for the worthless check.<sup>1</sup> Reliance on the check must have been the efficient inducement for services.<sup>2</sup> If the statute specifies the obtaining of something of value as an element of the offense, the giving of a worthless check in payment of a preexisting debt generally is not within the statute.<sup>3</sup> An exception in a dishonored-check statute for "a check given for a past consideration" refers to any check given in payment for a good or service that was received in the past, and thus, such a check does not give rise to criminal liability under the dishonored-check statute.<sup>4</sup>

In some jurisdictions, however, it is an offense to issue a worthless check, even though no money or property is obtained in return.<sup>5</sup> In one jurisdiction, a worthless check tendered for payment of a preexisting debt will sustain only a misdemeanor worthless check charge, rather than a felony charge of obtaining goods or services by means of a worthless check.<sup>6</sup>

A statute that prohibits issuing a check on an insufficient account with an intent to defraud applies to the issuance of a bad check to an employee as payment for earned wages.<sup>7</sup> A defendant who issues payroll checks with insufficient funds to cover them issues the checks in "exchange" for something of value, as required to support a conviction for issuing worthless checks, even though over a week has passed between the end of the pay period and the issuance of the checks.<sup>8</sup>

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#### Footnotes

- <sup>1</sup> State v. Hartman, 364 Mo. 1109, 273 S.W.2d 198 (1954).
- <sup>2</sup> Hindman v. State, 378 So. 2d 663 (Miss. 1980).
- <sup>3</sup> Jackson v. State, 251 Miss. 529, 170 So. 2d 438 (1965); State v. Stout, 142 W. Va. 182, 95 S.E.2d 639, 59 A.L.R.2d 1154 (1956).
- <sup>4</sup> State v. Schouweiler, 887 N.W.2d 22 (Minn. 2016).
- <sup>5</sup> Clifton v. State, 51 Del. 339, 145 A.2d 392, 68 A.L.R.2d 1266 (1958); State v. Campbell, 70 Idaho 408, 219 P.2d 956 (1950).
- <sup>6</sup> Duncan v. State, 135 So. 3d 361 (Fla. 5th DCA 2014).
- <sup>7</sup> State v. Campbell, 97 Idaho 331, 543 P.2d 1171 (1975).
- <sup>8</sup> State v. Cruz, 2011-NMSC-038, 150 N.M. 548, 263 P.3d 890 (2011).

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### False Pretenses

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#### V. Offenses as to Checks

##### A. Issuing Check Without Sufficient Funds

## § 66. Payee's knowledge of insufficient funds for check

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### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  15, 20

### A.L.R. Library

[Constitutionality of "bad check" statute](#), 16 A.L.R.4th 631

[Cashing check at bank at which account is maintained as violation of bad check statutes](#), 75 A.L.R.3d 1080

No offense occurs under a "worthless check" statute if the payee on a check, draft, or order has information that the maker or drawer of the check lacks sufficient funds on deposit in the bank on which the instrument is drawn.<sup>1</sup> Generally, cashing a check at one's own bank cannot be the basis for a conviction under a worthless check statute, because the bank official's knowledge of the depositor's account, or the bank employees' access to records providing such knowledge, should prevent the bank from being deceived by the false representation implied by the presentation of a worthless check.<sup>2</sup> Similarly, the element of intent to defraud may be negated by a showing that a casino had knowledge that the person obtaining a marker did not have sufficient funds to cover the marker at the time it was executed.<sup>3</sup> It has been held, however, that trick and deception may be alleged, in spite of the information available to the bank, due to the total pattern of the defendant's transactions with the bank, which may include making a small initial deposit, depositing valueless checks, and obtaining conditional credit.<sup>4</sup>

### Observation:

The factors in determining whether the intent element of intent to defraud may be negated include what the payor represented and what information was available to the payee.<sup>5</sup>

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Footnotes

- <sup>1</sup> [State v. Beard](#), 197 Kan. 275, 416 P.2d 783 (1966).
- <sup>2</sup> [State v. Mullin](#), 225 N.W.2d 305, 75 A.L.R.3d 1072 (Iowa 1975).
- <sup>3</sup> [Zahavi v. State](#), 343 P.3d 595, 131 Nev. Adv. Op. No. 7 (Nev. 2015), cert. denied, 136 S. Ct. 110, 193 L. Ed. 2d 89 (2015).
- <sup>4</sup> [State v. Todd](#), 372 S.W.2d 133 (Mo. 1963).
- <sup>5</sup> [Zahavi v. State](#), 343 P.3d 595, 131 Nev. Adv. Op. No. 7 (Nev. 2015), cert. denied, 136 S. Ct. 110, 193 L. Ed. 2d 89 (2015).

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## 32 Am. Jur. 2d False Pretenses § 67

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### False Pretenses

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#### V. Offenses as to Checks

##### A. Issuing Check Without Sufficient Funds

### § 67. Payee's knowledge of insufficient funds for check—Disclosure of insufficient funds or credit; postdating of check

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  15, 20

#### A.L.R. Library

[Constitutionality of "bad check" statute](#), 16 A.L.R.4th 631

[Application of "bad check" statute with respect to postdated checks](#), 52 A.L.R.3d 464

The crime of check deception does not occur when the payor can establish shared knowledge between payor and payee, namely that the payor has shared a particular knowledge with the payee that the check will not be paid upon presentment in the usual course of business due to insufficient funds or postdating, as in accepting the check under those circumstances, the payee has not been misled, deceived, or defrauded.<sup>1</sup> If an intent to defraud is an element of the offense under a "worthless check statute," the disclosure by the drawer of a check to the payee, at the time of issuance of the check, that the drawer lacks sufficient funds with the bank to meet the check purges the transaction of its criminal character and a postdated, worthless check relieves the drawer of criminal responsibility,<sup>2</sup> since the check implies on its face a present insufficiency of funds and represents a promise to discharge a present obligation on a future date.<sup>3</sup> The disclosure of a present insufficiency of funds has been held to preclude conviction even after the maker of the check fraudulently promises to deposit funds to cover the check.<sup>4</sup> The maker of the check may be required, however, to call the postdate to the attention of the payee or to arrange with the payee to hold the check.<sup>5</sup>

Absent fraudulent intent, the transaction becomes essentially one of extending credit to the drawer.<sup>6</sup>

In contrast, if an intent to defraud is not an element of the offense under the worthless check statute, the maker of a worthless check may be convicted, even if he or she informed the payee of a lack of funds in the bank to meet the check.<sup>7</sup>

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Footnotes

- <sup>1</sup> Neese v. State, 994 N.E.2d 336 (Ind. Ct. App. 2013).
- <sup>2</sup> Banderas v. State, 372 So. 2d 489 (Fla. 3d DCA 1979); State v. Beard, 197 Kan. 275, 416 P.2d 783 (1966); State v. Downing, 83 N.M. 62, 1971-NMCA-122, 488 P.2d 112, 52 A.L.R.3d 461 (Ct. App. 1971).
- <sup>3</sup> State v. Beard, 197 Kan. 275, 416 P.2d 783 (1966); People on Complaint of Indig v. Kapitofsky, 144 Misc. 543, 258 N.Y.S. 861 (Magis. Ct. 1932); Com. v. Kelinson, 199 Pa. Super. 135, 184 A.2d 374 (1962).
- <sup>4</sup> People v. Poyet, 6 Cal. 3d 530, 99 Cal. Rptr. 758, 492 P.2d 1150 (1972).
- <sup>5</sup> State v. Eikelberger, 72 Idaho 245, 239 P.2d 1069, 29 A.L.R.2d 1176 (1951).
- <sup>6</sup> State v. Eikelberger, 72 Idaho 245, 239 P.2d 1069, 29 A.L.R.2d 1176 (1951); People v. Cundiff, 16 Ill. App. 3d 267, 305 N.E.2d 735 (3d Dist. 1973); Hubbard v. Com., 201 Va. 61, 109 S.E.2d 100 (1959).
- <sup>7</sup> State v. Spitko, 2 Conn. Cir. Ct. 99, 195 A.2d 577 (App. Div. 1963); State v. Beard, 197 Kan. 275, 416 P.2d 783 (1966); State v. Taylor, 335 Mo. 460, 73 S.W.2d 378, 95 A.L.R. 476 (1934).

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### False Pretenses

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#### V. Offenses as to Checks

##### A. Issuing Check Without Sufficient Funds

### § 68. Payment of check after notice of dishonor; restitution

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#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  15

#### A.L.R. Library

[Admissibility, in prosecution for obtaining money or property by fraud or false pretenses, of evidence of subsequent payments made by accused to victim, 10 A.L.R.3d 572](#)

In the absence of a statute providing otherwise, restitution generally is not a defense to a prosecution for obtaining property by false pretenses.<sup>1</sup> Under a “worthless check” statute that makes nonpayment after notice of dishonor an element of the offense, however, payment by the drawer within a given period after notice of dishonor may be a defense to prosecution under the statute.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Kravets v. State](#), 360 So. 2d 486 (Fla. 4th DCA 1978); [State v. McWilliams](#), 331 S.W.2d 610 (Mo. 1960).

<sup>2</sup> [State v. Johnson](#), 116 Kan. 390, 226 P. 758 (1924); [State v. Parsons](#), 6 N.J. Misc. 76, 140 A. 13 (Sup. Ct. 1928), *aff'd*, 105 N.J.L. 253, 142 A. 918 (N.J. Ct. Err. & App. 1928); [State v. Price](#), 83 W. Va. 71, 97 S.E. 582, 5 A.L.R. 1247 (1918).

Evidence was insufficient to establish a defendant received actual notice in writing that his check had not been paid due to insufficient funds, as required to establish the offense of passing a bad check; the State failed to prove the defendant actually received the 10-day letter, and the passing a bad check statute required proof of actual notice in writing. [State v. Williams](#), 469 S.W.3d 6 (Mo. Ct. App. S.D. 2015).

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#### V. Offenses as to Checks

##### A. Issuing Check Without Sufficient Funds

## § 69. Evidence of worthless check

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West's Key Number Digest, [False Pretenses](#)  15, 20

If the state demonstrates by competent evidence that a check was presented to the drawee bank and that payment was refused, such a showing is material and competent evidence of a lack of funds.<sup>1</sup> The prosecution may also use as material evidence at trial the extreme indebtedness of a defendant charged with issuing checks having insufficient funds.<sup>2</sup>

The offense of issuing a bad check requires proof that the defendant signed or otherwise authorized the check in question.<sup>3</sup>

Alleged hold-check agreements are not relevant to the issue of intent in a prosecution for passing bad checks arising out of checks that were dishonored based on stop payment orders, as the intent required for conviction does not depend upon when the payee attempts to present the check to the drawee.<sup>4</sup>

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#### Footnotes

<sup>1</sup> [State v. Kulow](#), 255 Iowa 789, 123 N.W.2d 872, 16 A.L.R.3d 1085 (1963).

<sup>2</sup> [People v. Rivera](#), 186 Cal. App. 3d 251, 230 Cal. Rptr. 533 (2d Dist. 1986).

<sup>3</sup> [Delay-Wilson v. State](#), 264 P.3d 375 (Alaska Ct. App. 2011).

<sup>4</sup> [Albertson v. State](#), 212 Md. App. 531, 69 A.3d 1186 (2013).  
As to intent to defraud with a check, generally, see §§ 63, 64.



## 32 Am. Jur. 2d False Pretenses § 70

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### False Pretenses

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#### V. Offenses as to Checks

##### A. Issuing Check Without Sufficient Funds

### § 70. Evidence of worthless check—Presumptions

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#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  15, 20

An intent to defraud is commonly presumed from a failure of payment on the check after notice of its dishonor.<sup>1</sup> Payment after notice of dishonor merely negates the presumption of fraudulent intent.<sup>2</sup> A statute may constitutionally provide that the state establishes a prima facie case that the accused intended to defraud when the state shows (1) that the accused drew the check, (2) that the drawee refused payment of the check upon presentation because of insufficient funds, and (3) that the drawer failed to make payment within seven days after notice of nonpayment.<sup>3</sup>

Such evidence may also establish a prima facie case that the accused knew of insufficient funds in the depository for payment of the check on presentation.<sup>4</sup>

In one jurisdiction it has been held that the state is not required to show that the individual who received the bad check witnessed the check maker's signature on the check and then initialed the check in order to convict the maker; such information is not an essential element of the offense that the state has to prove, but rather set forth a means to establish a statutory presumption with respect to the identity of the party who issued the check and the party's authority to draw on the named account.<sup>5</sup>

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#### Footnotes

<sup>1</sup> [State v. Lansman](#), 245 Iowa 102, 60 N.W.2d 815 (1953); [State v. Haremza](#), 213 Kan. 201, 515 P.2d 1217 (1973); [State v. Taylor](#), 335 Mo. 460, 73 S.W.2d 378, 95 A.L.R. 476 (1934); [Cook v. Commonwealth](#), 178 Va. 251, 16 S.E.2d 635 (1941).

A statutory presumption of an intent to defraud does not apply if the check was issued for a preexisting debt. [State v. Campbell](#), 97 Idaho 331, 543 P.2d 1171 (1975).

As to intent to defraud with a check, generally, see §§ 63, 64.

<sup>2</sup> [Locklear v. State](#), 86 Wis. 2d 603, 273 N.W.2d 334 (1979).

<sup>3</sup>            [State v. Haremza, 213 Kan. 201, 515 P.2d 1217 \(1973\).](#)  
As to insufficiency of funds, generally, see [§ 62](#).

<sup>4</sup>            [State v. Haremza, 213 Kan. 201, 515 P.2d 1217 \(1973\).](#)

<sup>5</sup>            [Dougherty v. State, 292 Ga. App. 188, 664 S.E.2d 258 \(2008\).](#)

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V. Offenses as to Checks

B. Passing Fictitious Check or Check on Closed Account

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A.L.R. Index, Fraud and Deceit

A.L.R. Index, Tricks and Trickery

West's A.L.R. Digest, [False Pretenses](#)  15, 20

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## 32 Am. Jur. 2d False Pretenses § 71

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### False Pretenses

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#### V. Offenses as to Checks

##### B. Passing Fictitious Check or Check on Closed Account

### § 71. Passing fictitious check

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#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  15, 20

#### Trial Strategy

[Bank's Failure to Use Ordinary Care in Detecting Forged or Altered Checks, 13 Am. Jur. Proof of Facts 2d 347](#)

[Ratification of Forged or Unauthorized Signature, 7 Am. Jur. Proof of Facts 2d 675](#)

#### Forms

Forms relating to forged checks, signatures, and indorsements, generally, see Am. Jur. Pleading and Practice Forms, Banks; Am. Jur. Pleading and Practice Forms, Commercial Code; Am. Jur. Legal Forms 2d, Affidavits and Declarations [\[Westlaw®\(r\) Search Query\]](#)

State statutory law prohibits the passing of a fictitious check purporting to be that of a bank, firm, or individual that does not exist, if the person passing the check intends to defraud and knows of the nonexistence of the bank, firm, or individual.<sup>1</sup> Under some such statutes, the passing of such a check constitutes forgery.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [People v. Roche](#), 74 Cal. App. 556, 241 P. 279 (1st Dist. 1925); [State v. Tinnin](#), 64 Utah 587, 232 P. 543, 43 A.L.R. 46 (1925).

Evidence was sufficient to establish that a defendant committed forgery; the defendant was a person who, posing as a fictitious person, wrote and passed a check, at the time of arrest, he possessed blank checks largely identical to the check at issue and a false state identification card for a fictitious person with his own picture and address printed on the check, so the defendant possessed writing that purported to be act of another who did not authorize act because fictitious person did not exist, defendant possessed check with intent to pass it, because he did, and defendant knew check was drawn on nonexistent bank account, and defendant intended to defraud and harm store. [Ford v. State](#), 282 S.W.3d 256 (Tex. App. Austin 2009).

The evidence supported a conviction for obtaining property by false pretenses based on a defendant's practice of giving counterfeit checks to third persons to cash for him; the defendant told such persons that the checks were good and that he had done it several times, and the bank released money to the third persons who in turn gave it to the defendant. [State v. McBride](#), 187 N.C. App. 496, 653 S.E.2d 218 (2007).

<sup>2</sup> [State v. Williams](#), 46 Nev. 263, 210 P. 995 (1922).

## 32 Am. Jur. 2d False Pretenses § 72

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### False Pretenses

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#### V. Offenses as to Checks

##### B. Passing Fictitious Check or Check on Closed Account

### § 72. Passing of check drawn on closed account

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#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  15, 20

A defendant's fraudulent intent in possessing and attempting to pass checks drawn on a closed account renders their possession illegal under statutes prohibiting the possession of a forged completed check and writing a check with insufficient funds.<sup>1</sup> A check drawn on a closed account in exchange for equipment rental was presented "in exchange for a present consideration," within the meaning of a statute defining the offense of deposit account fraud, where the rental of multiple pieces of construction equipment constituted a single transaction, which was not completed until the victim picked up the equipment, calculated the amount due for necessary repairs, and presented the defendant with an invoice for which he immediately wrote a check.<sup>2</sup> Also, evidence that a defendant wrote a personal check to the victim, in exchange for cash, and that the defendant's bank refused payment on the check because the defendant's account was closed, permitted an inference of the requisite intent to support a conviction of misdemeanor check deception; the trier of fact could reasonably infer from the evidence that the defendant was aware of a high probability that she was issuing a bad check at the time of issuance, and the mere fact that the defendant issued the check, payment of which was refused by the drawee bank, constituted prima facie evidence that the defendant knew the check would not be honored upon presentment.<sup>3</sup>

#### Reminder:

It is not unlawful under a bad check statute for an individual to close an account when a dispute develops between the individual and the recipient regarding the goods or services rendered by the latter.<sup>4</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Evidence supported finding that defendant knew or believed that the business check she issued to a bar that held her wedding reception would not be paid by the bank, as required for prosecution of issuing bad checks, where records showed that defendant exercised control and authorization over the account as the manager of the limited liability company from which the check was drawn, that the company identified as owning the account, that the bank closed the account 22 days before defendant issued the check, that the account had been continuously overdrawn with dozens of items returned due to insufficient funds, that the account had maintained a negative balance for more than a month, and defendant opened a personal checking account the day after the business account was closed. [N.H. Rev. Stat. Ann. § 638:4. State v. Boggs, 191 A.3d 535 \(N.H. 2018\).](#)

### [END OF SUPPLEMENT]

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### Footnotes

- <sup>1</sup> [People v. Mathers, 183 Cal. App. 4th 1464, 108 Cal. Rptr. 3d 720 \(3d Dist. 2010\).](#)
- <sup>2</sup> [Gibson v. State, 315 Ga. App. 639, 727 S.E.2d 251 \(2012\).](#)
- <sup>3</sup> [Neese v. State, 994 N.E.2d 336 \(Ind. Ct. App. 2013\).](#)
- <sup>4</sup> [§ 62.](#)

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### 32 Am. Jur. 2d False Pretenses VI Refs.

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False Pretenses


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VI. Obtaining Money or Property Through Confidence Game

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## 32 Am. Jur. 2d False Pretenses § 73

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#### VI. Obtaining Money or Property Through Confidence Game

### § 73. Statutes governing obtaining money or property through confidence game; elements of offense

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#### West's Key Number Digest

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[Construction and application of state or municipal enactments relating to policy or numbers games, 70 A.L.R.3d 897](#)

[Attempts to commit offenses of larceny by trick, confidence game, false pretenses, and the like, 6 A.L.R.3d 241](#)

While statutes establishing the offense of obtaining property or money by means of a “confidence game” vary, an offense under a “confidence game” statute generally occurs when one obtains the confidence of another person with the intention of taking advantage of that confidence and obtains the other’s money or property by in fact taking advantage of the other’s confidence.<sup>1</sup> In the case of fraud or larceny by trick, the owner willingly entrusts his or her property to the hands of another for some purpose, unaware that he or she is being deceived.<sup>2</sup> It is no bar to a confidence game prosecution that the victim is a corporation.<sup>3</sup>

In addition to the reposing of confidence, a confidence game requires some sort of false representation, deception, trick, device, or scheme by which the victim is swindled.<sup>4</sup>

#### Observation:

The crime of obtaining property by means of the confidence game and that of obtaining property by false or fraudulent representation or pretenses are distinct offenses.<sup>5</sup>

The essence of a “swindle” is the defrauding of another of his property by deliberate artifice.<sup>6</sup> While it is true that someone who intentionally and without claim of right retains possession of movable property of another without the other’s consent may be guilty of theft, the theft by swindle statute is intended to punish any fraudulent scheme, trick, or device whereby the wrongdoer deprives the victim of his money or property by deceit or betrayal of confidence.<sup>7</sup>

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#### Footnotes

- <sup>1</sup> [McBride v. People](#), 126 Colo. 277, 248 P.2d 725 (1952); [Rucker v. State](#), 88 Okla. Crim. 15, 195 P.2d 299 (1948); [State v. Keeling](#), 89 S.D. 436, 233 N.W.2d 586 (1975).
- <sup>2</sup> [Keybank, Nat. Ass’n v. Mascarenas](#), 17 P.3d 209, 43 U.C.C. Rep. Serv. 2d 580 (Colo. App. 2000).
- <sup>3</sup> [People v. Walker](#), 60 Ill. App. 2d 178, 208 N.E.2d 840 (1st Dist. 1965).
- <sup>4</sup> [Clark v. State](#), 53 Ariz. 416, 89 P.2d 1077 (1939); [People v. Sceri](#), 407 Ill. 90, 95 N.E.2d 80 (1950); [State v. Keeling](#), 89 S.D. 436, 233 N.W.2d 586 (1975).  
The defendant told the intended victim and a passerby, who was actually a coconspirator, that the defendant was entitled to \$150,000. He then said that he would give them each a share of the money, since he had to leave the country soon. To assure their reliability, each would have to withdraw several hundred dollars from his or her bank account. The coconspirator pretended to withdraw \$15,000. The intended victim stated that he or she had between \$6,000 and \$7,000 in a safe deposit box, but he or she instead summoned the police. The defendant was properly convicted under a general felony statute proscribing conspiracy to defraud another of property by theft. [People v. Proctor](#), 18 Cal. App. 4th 1055, 22 Cal. Rptr. 2d 888 (2d Dist. 1993).
- <sup>5</sup> [State v. Allen](#), 128 Mont. 306, 275 P.2d 200 (1954).
- <sup>6</sup> [In re Disciplinary Action against Bonner](#), 896 N.W.2d 98 (Minn. 2017).
- <sup>7</sup> [City of Farmington Hills Employees Retirement System v. Wells Fargo Bank, N.A.](#), 979 F. Supp. 2d 981 (D. Minn. 2013) (Minnesota statute).  
A “trick” of presenting a watch appearing to be authentic through use of a trademark name or unique trademark features may be sufficient to constitute theft by swindle. [El-Ghazzawy v. Berthiaume](#), 708 F. Supp. 2d 874 (D. Minn. 2010), *aff’d*, 636 F.3d 452 (8th Cir. 2011) (Minnesota law).



## 32 Am. Jur. 2d False Pretenses § 74

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False Pretenses


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### VI. Obtaining Money or Property Through Confidence Game

## § 74. Constitutionality of criminalizing “confidence game”

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West’s Key Number Digest

West’s Key Number Digest, [False Pretenses](#)  16

Generally, the charge of obtaining property or money by means of the confidence game sufficiently describes the means of committing the offense.<sup>1</sup> The validity of such statutes has been upheld against the claim that they violate the accused’s constitutional right under the Sixth Amendment to be apprised of the nature and cause of the accusation against him or her,<sup>2</sup> or that they are void for uncertainty under the Fourteenth Amendment’s Due Process guarantee.<sup>3</sup>

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### Footnotes

<sup>1</sup> [Wright v. People](#), 116 Colo. 306, 181 P.2d 447 (1947); [People v. Gibbs](#), 413 Ill. 154, 108 N.E.2d 446 (1952); [State v. Theriot](#), 139 La. 741, 72 So. 191 (1916).

<sup>2</sup> [Wright v. People](#), 116 Colo. 306, 181 P.2d 447 (1947); [Graham v. People](#), 181 Ill. 477, 55 N.E. 179 (1899); [Lazar v. State](#), 1954 OK CR 116, 275 P.2d 1003 (Okla. Crim. App. 1954).

<sup>3</sup> [People v. Bertsche](#), 265 Ill. 272, 106 N.E. 823 (1914).  
The term “confidence game” has a well-defined and generally recognized and understood meaning and when used in an accusation, it is sufficiently clear to inform the public or any person charged with the offense of its nature and the means through which it is alleged to have been perpetrated. [State ex rel. Kavanaugh v. Mitchiner](#), 204 La. 415, 15 So. 2d 809 (1943).

## 32 Am. Jur. 2d False Pretenses VII A Refs.

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## VII. False Statements or Claims by, Against, or to Influence Government Officials; Related Offenses

### A. In General

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## Research References

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#) 🔑 5, 18, 19  
West's Key Number Digest, [Fraud](#) 🔑 68.10(1) to 68.10(4)  
West's Key Number Digest, [United States](#) 🔑 1251 to 1297

### A.L.R. Library

A.L.R. Index, False Pretenses  
A.L.R. Index, Fraud and Deceit  
West's A.L.R. Digest, [False Pretenses](#) 🔑 5, 18, 19  
West's A.L.R. Digest, [Fraud](#) 🔑 68.10(1) to 68.10(4)  
West's A.L.R. Digest, [United States](#) 🔑 1251 to 1297

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## 32 Am. Jur. 2d False Pretenses § 75

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### False Pretenses

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## VII. False Statements or Claims by, Against, or to Influence Government Officials; Related Offenses

### A. In General

#### 1. False Claims Against United States

## § 75. False, fictitious or fraudulent claims against United States, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#) 5, 18, 19

West's Key Number Digest, [Fraud](#) 68.10(1) to 68.10(4)

West's Key Number Digest, [United States](#) 1251 to 1297

### A.L.R. Library

[Criminal liability for wrongfully obtaining unemployment benefits](#), 80 A.L.R.3d 1280

[Determination of loss caused by crime involving fraud or deceit, under United States Sentencing Guidelines sec. 2F1.1 \(U.S.S.G.\)](#), 118 A.L.R. Fed. 585

Under federal law, whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, must be imprisoned and is subject to a fine.<sup>1</sup> The purpose of the statute is to assure the integrity of claims and vouchers submitted to the government.<sup>2</sup>

In a prosecution of a defendant for making false claims, the government is not required to prove motive,<sup>3</sup> but simply knowledge of the falsity of the claims.<sup>4</sup> Under the statute, the government must prove that the defendant knew the statements were false at the time that he or she made them.<sup>5</sup> Generally, the required intent is not limited to an intent to defraud.<sup>6</sup> The scienter requirement is merely “knowledge.”<sup>7</sup> In a prosecution for filing a false claim with the United States, the government need not prove willfulness, but rather only that the defendant knew the claim was false, as it is implicit in the filing of a knowingly false claim that the claimant intends to defraud the government, and hence unnecessary to charge willfulness separately.<sup>8</sup>

There can be a conviction under the federal statute if a false claim is submitted to a state agency concerning a project or program that receives federal funding or in which the federal government is involved.<sup>9</sup>

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#### Footnotes

- <sup>1</sup> 18 U.S.C.A. § 287.  
As to department and agency defined, see § 77.
- <sup>2</sup> U.S. v. Maher, 582 F.2d 842 (4th Cir. 1978).
- <sup>3</sup> U.S. v. Croteau, 819 F.3d 1293 (11th Cir. 2016), cert. denied, 137 S. Ct. 254, 196 L. Ed. 2d 192 (2016).
- <sup>4</sup> U.S. v. Barker, 967 F.2d 1275 (9th Cir. 1991); U.S. v. Croteau, 819 F.3d 1293 (11th Cir. 2016), cert. denied, 137 S. Ct. 254, 196 L. Ed. 2d 192 (2016).
- <sup>5</sup> U.S. v. Barker, 967 F.2d 1275 (9th Cir. 1991), referring to 18 U.S.C.A. § 287.
- <sup>6</sup> U.S. v. Maher, 582 F.2d 842 (4th Cir. 1978); U.S. v. Milton, 602 F.2d 231 (9th Cir. 1979).
- <sup>7</sup> U.S. v. Precision Medical Laboratories, Inc., 593 F.2d 434 (2d Cir. 1978); U.S. v. Cook, 586 F.2d 572 (5th Cir. 1978).
- <sup>8</sup> U.S. v. Clarke, 801 F.3d 824 (7th Cir. 2015).
- <sup>9</sup> U.S. v. Montoya, 716 F.2d 1340, 14 Fed. R. Evid. Serv. 34 (10th Cir. 1983).

## 32 Am. Jur. 2d False Pretenses § 76

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False Pretenses

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### VII. False Statements or Claims by, Against, or to Influence Government Officials; Related Offenses


#### A. In General

##### 1. False Claims Against United States

## § 76. Conspiracy to obtain payment of false claim by federal government

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  18, 19

West's Key Number Digest, [United States](#)  1251 to 1297

#### A.L.R. Library

[Determination of loss caused by crime involving fraud or deceit, under United States Sentencing Guidelines sec. 2F1.1 \(U.S.S.G.\), 118 A.L.R. Fed. 585](#)

Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, must be fined or imprisoned, or both.<sup>1</sup> The government has the burden of establishing guilt beyond a reasonable doubt.<sup>2</sup> Conspiracies to defraud the United States or a federal department or agency have occurred when—

- a defendant conspired to defraud the United States by obtaining a fraudulent tax credit and refunds.<sup>3</sup>
- a false advance funding claim was filed with the Small Business Administration by a participant in an SBA program.<sup>4</sup>
- an executive director of a city housing authority committed fraud against the United States while acting as a public official administering public funds.<sup>5</sup>

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#### Footnotes

<sup>1</sup> 18 U.S.C.A. § 286.

<sup>2</sup> U.S. v. Kelinson, 205 F.2d 600 (2d Cir. 1953).

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<sup>3</sup> U.S. v. Laws, 819 F.3d 388 (8th Cir. 2016).

<sup>4</sup> U.S. v. Uzzell, 780 F.2d 1143 (4th Cir. 1986).

<sup>5</sup> U.S. v. Wheadon, 794 F.2d 1277 (7th Cir. 1986).

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## 32 Am. Jur. 2d False Pretenses § 77

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### False Pretenses

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## VII. False Statements or Claims by, Against, or to Influence Government Officials; Related Offenses


### A. In General


#### 1. False Claims Against United States

## § 77. Department and agency defined for purposes of false claim against United States

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  18

West's Key Number Digest, [Fraud](#)  68.10(3)

West's Key Number Digest, [United States](#)  1251 to 1254, 1295(5)

The term “department” means one of the executive departments enumerated by statute pertaining to government organization, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.<sup>1</sup> The term “agency” includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.<sup>2</sup> However, a federal court is neither a department nor an agency within the meaning of the statute.<sup>3</sup> A federal works agency is a department.<sup>4</sup>

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### Footnotes

<sup>1</sup> 18 U.S.C.A. § 6, referring to 5 U.S.C.A. § 101.

<sup>2</sup> 18 U.S.C.A. § 6.

<sup>3</sup> *Hubbard v. U.S.*, 514 U.S. 695, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995).

<sup>4</sup> *U.S. v. MacEvoy*, 58 F. Supp. 83 (D.N.J. 1944).





## 32 Am. Jur. 2d False Pretenses § 78

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### False Pretenses

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## VII. False Statements or Claims by, Against, or to Influence Government Officials; Related Offenses


### A. In General


#### 1. False Claims Against United States

## § 78. Other criminal conduct with respect to false claims against United States

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  18, 19

West's Key Number Digest, [United States](#)  1293 to 1297

### A.L.R. Library

[What constitutes a public record or document within statute making falsification, forgery, mutilation, removal, or other misuse thereof an offense, 75 A.L.R.4th 1067](#)

[Application of Inadmissibility Provision Relating to False Claims of United States Citizenship, 8 U.S.C.A. s1182\(a\)\(6\)\(C\)\(ii\), 77 A.L.R. Fed. 2d 131](#)

Under federal law, it is a crime—

- to knowingly and with intent to defraud the United States, or any agency thereof, possess any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States, or from any agency, officer or agent thereof, any sum of money.<sup>1</sup>
- to knowingly and fraudulently demand or endeavor to obtain any share or sum in the public stocks of the United States, or to have any part thereof transferred, assigned, sold, or conveyed, or to have any annuity, dividend, pension, wages, gratuity, or other debt due from the United States, or any part thereof, received, or paid by virtue of any false, forged, or counterfeited power of attorney, authority, or instrument.<sup>2</sup>
- for an officer, director, agent, or employee of any Federal Reserve bank, member bank of the Federal Reserve System, insured bank, branch or agency of a foreign bank, or organization operating the Federal Reserve Act, to certify a check before the amount thereof has been regularly deposited in the bank, branch, agency, or organization, by the drawer thereof, or resort to any device, or receive any fictitious obligation, directly or collaterally, in order to evade any of the provisions of law relating to certification of checks,<sup>3</sup> or make any false entry in any book, report, or statement of such bank.<sup>4</sup>

- for an officer, agent or employee of a federal credit institution to make any false entry in any book, report or statement of or to any such institution.<sup>5</sup>
- for the purpose of influencing in any way the action of the Federal Deposit Insurance Corporation, to knowingly make or invite reliance on a false, forged, or counterfeit statement, document, or thing.<sup>6</sup>
- for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit will be offered to or accepted by the Department of Housing and Urban Development for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Department, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Department, to make, pass, utter, or publish any statement, knowing the same to be false, or to alter, forge, or counterfeit any instrument, paper, or document, or to utter, publish, or pass as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or to willfully overvalue any security, asset, or income.<sup>7</sup>
- for a mortgagee knowingly to make any false statement in any paper, proposal, or letter, relating to the sale of any mortgage, to any federal land bank; or being an appraiser, willfully to overvalue any land securing such mortgage.<sup>8</sup>
- for anyone with intent to defraud, make any false entry in any book of the Department of Housing and Urban Development or make any false report or statement to or for the Department; or to receive any compensation, rebate, or reward, with intent to defraud the Department or with intent to unlawfully defeat its purposes; or to induce or influence the Department to purchase or acquire any property or to enter into any contract and willfully fail to disclose any interest which he has in such property or in the property to which such contract relates, or any special benefit which he expects to receive as a result of such contract.<sup>9</sup>
- to deceive or attempt to deceive concerning the character or terms of a farm loan bond or federal credit bank debenture.<sup>10</sup>
- to knowingly make a false statement or to willfully overvalue any land, property, or security for the purpose of influencing a federal loan or credit application.<sup>11</sup>
- to knowingly make any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens.<sup>12</sup>
- for an officer authorized to administer oaths or to take and certify acknowledgments, to knowingly make any false acknowledgment, certificate, or statement concerning the appearance before him or the taking of an oath or affirmation by any person with respect to any proposal, contract, bond, undertaking, or other matter submitted to, made with, or taken on behalf of the United States or any department or agency thereof, concerning which an oath or affirmation is required by law or lawful regulation, or with respect to the financial standing of any principal, surety, or other party to any such proposal, contract, bond, undertaking, or other instrument.<sup>13</sup>
- to fraudulently or wrongfully affix or impress the seal of any department or agency of the United States, to or upon any certificate, instrument, commission, document, or paper or with knowledge of its fraudulent character, with wrongful or fraudulent intent, to use, buy, procure, sell, or transfer to another any such certificate, instrument, commission, document, or paper, to which or upon which said seal has been so fraudulently affixed or impressed.<sup>14</sup>
- for a public officer or other person authorized by any law of the United States to make or give a certificate or other writing, knowingly to make and deliver as true such a certificate or writing, containing any statement which he knows to be false.<sup>15</sup>
- for a consul, or vice consul, or other person employed in the consular service of the United States, knowingly to certify falsely to any invoice, or other paper, to which his certificate is authorized or required by law.<sup>16</sup>
- for a federal employee to make a false statement concerning a highway project.<sup>17</sup>
- for an officer or other person authorized by any law of the United States to record a conveyance of real property or any other instrument which by such law may be recorded, knowingly to certify falsely that such conveyance or instrument has or has not been recorded.<sup>18</sup>
- for a person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property used or to be used in the military or naval service, to make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any agency thereof.<sup>19</sup>
- for anyone having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States, or any agency thereof, or any corporation in which the United States has a proprietary interest, or intending to conceal such money or other property, to deliver to any person having authority to receive the same any amount of such money or other property less than that for which he received a certificate or took a receipt.<sup>20</sup>
- to purchase or receive in pledge from any person any arms, equipment, ammunition, clothing, military stores, or other

- property furnished by the United States under a clothing allowance or otherwise.<sup>21</sup>
- for any person upon any waters or vessel within the special maritime and territorial jurisdiction of the United States, by any fraud, or false pretense, to obtain from any person anything of value, or to procure the execution and delivery of any instrument of writing or conveyance of real or personal property, or the signature of any person, as maker, endorser, or guarantor, to or upon any bond, bill, receipt, promissory note, draft, or check, or any other evidence of indebtedness, or to fraudulently sell, barter, or dispose of any bond, bill, receipt, promissory note, draft, or check, or other evidence of indebtedness, for value, knowing the same to be worthless, or knowing the signature of the maker, endorser, or guarantor thereof to have been obtained by any false pretenses.<sup>22</sup>
  - to knowingly make any false statement for the purpose of influencing in any way the action of the Secretary of Agriculture, or of any person acting under the Secretary's authority, in connection with any compromise, adjustment, or cancellation of any farm indebtedness.<sup>23</sup>
  - to make any false statement or representation of fact, knowing it to be false, or knowingly conceal, cover up, or fail to disclose any fact the disclosure of which is required by statute or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by statute to be published or any information required by statute to be certified under the Employee Retirement Income Security Act.<sup>24</sup>
  - to knowingly possesses an identification document (other than one issued lawfully for the use of the possessor), authentication feature, or a false identification document, with the intent such document or feature be used to defraud the United States.<sup>25</sup>
  - to knowingly execute, or attempt to execute, any scheme or artifice with the intent to defraud the United States; or to obtain money or property by means of false or fraudulent pretenses, representations, or promises, in any grant, contract, subcontract, subsidy, loan, guarantee, insurance, or other form of federal assistance.<sup>26</sup>
  - in any matter involving a health care benefit program, to willfully falsify, conceal, or cover up by any trick, scheme, or device a material fact; or make any materially false, fictitious, or fraudulent statements or representations, or make or use any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, in connection with the delivery of or payment for health care benefits, items, or services.<sup>27</sup>
  - by any fraud or false pretense, to enter or attempt to enter any real property belonging in whole or in part to, or leased by, the United States; any vessel or aircraft belonging in whole or in part to, or leased by, the United States; any secure or restricted area of any seaport, designated as secure in an approved security plan, as required under statute, and the rules and regulations promulgated under statute; or any secure area of any airport.<sup>28</sup>
  - to knowingly falsify, conceal, or cover up by any trick, scheme, or device any material fact; or make any materially false, fictitious, or fraudulent statement or representation, or make or use any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or representation, in any matter involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a major disaster declaration.<sup>29</sup>
  - to knowingly make or cause to be made a false writing concerning an application for insurance or benefits claim under National Service Life Insurance, United States government life insurance, or yearly renewable term insurance.<sup>30</sup>
- Federal law also establishes penalties for other criminal conduct with respect to claims against the government, including—
- the unauthorized taking or use of papers relating to a claim against the United States.<sup>31</sup>
  - making a false claim for a postal loss.<sup>32</sup>
  - knowingly and willfully making or presenting a false writing on a pension claim or any other matter within the jurisdiction of the Secretary of Veteran Affairs.<sup>33</sup>
  - withholding by a claim agent of discharge papers for military personnel.<sup>34</sup>
  - the purchase by a court official, at less than full face value, directly or indirectly, of a claim against the United States for the fee, mileage, or expenses of a witness or court officer.<sup>35</sup>
  - the solicitation of employment and receipt of unapproved fees concerning federal employees' compensation.<sup>36</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

There was sufficient evidence that mortgage loan application submitted by defendant's employee on his behalf to Department of Housing and Urban Development (HUD) contained false statements, as required to support his conviction for making false entries to a federal credit institution; while application did not expressly affirm the veracity of attached supporting documents, application included the same false statements about income and rental payments that were contained in attached

documents. [18 U.S.C.A. § 1006](#). [United States v. Brown](#), 898 F.3d 636 (5th Cir. 2018).

**[END OF SUPPLEMENT]**

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**Footnotes**

- <sup>1</sup> [18 U.S.C.A. § 1002](#).
- <sup>2</sup> [18 U.S.C.A. § 1003](#).
- <sup>3</sup> [18 U.S.C.A. § 1004](#).  
As to wrongful certification of checks and overcertification, generally, see [Am. Jur. 2d, Banks and Financial Institutions § 433](#).
- <sup>4</sup> [18 U.S.C.A. § 1005](#).  
As to false entries in the books of a bank, generally, see [Am. Jur. 2d, Banks and Financial Institutions §§ 443 to 445](#).
- <sup>5</sup> [18 U.S.C.A. § 1006](#).
- <sup>6</sup> [18 U.S.C.A. § 1007](#).
- <sup>7</sup> [18 U.S.C.A. § 1010](#).
- <sup>8</sup> [18 U.S.C.A. § 1011](#).
- <sup>9</sup> [18 U.S.C.A. § 1012](#).
- <sup>10</sup> [18 U.S.C.A. § 1013](#).
- <sup>11</sup> [18 U.S.C.A. § 1014](#).  
To establish a violation of the statute prohibiting the making of false statements on an Farm Service Agency (FSA) loan application, the government must prove that (1) the defendant made a false statement, (2) the defendant acted knowingly, and (3) the false statement was made for the purpose of influencing action on the loan. [U.S. v. Colon-Rodriguez](#), 696 F.3d 102 (1st Cir. 2012); [U.S. v. Alexander](#), 679 F.3d 721 (8th Cir. 2012).
- <sup>12</sup> [18 U.S.C.A. § 1015\(a\)](#).  
As to deportation for aliens for falsification of documents or falsely claiming citizenship, see [Am. Jur. 2d, Aliens and Citizens §§ 2661 to 2671](#).
- <sup>13</sup> [18 U.S.C.A. § 1016](#).
- <sup>14</sup> [§ 16](#).
- <sup>15</sup> [18 U.S.C.A. § 1018](#).
- <sup>16</sup> [18 U.S.C.A. § 1019](#).
- <sup>17</sup> [18 U.S.C.A. § 1020](#).
- <sup>18</sup> [18 U.S.C.A. § 1021](#).
- <sup>19</sup> [18 U.S.C.A. § 1022](#).
- <sup>20</sup> [18 U.S.C.A. § 1023](#).

21           18 U.S.C.A. § 1024.

22           18 U.S.C.A. § 1025.  
As to acquisition of checks, notes and the like, see § 36.

23           18 U.S.C.A. § 1026, referring to 12 U.S.C.A. §§ 1150, 1150a, 1150b.

24           18 U.S.C.A. § 1027.

25           18 U.S.C.A. § 1028(a)(4).

26           18 U.S.C.A. § 1031(a) (Major Fraud Act).  
The Major Fraud Act is patterned after the mail and wire fraud statutes, which require materiality of the falsehood, and “to defraud” suggests a misrepresentation or concealment of facts. [U.S. v. Bowling](#), 108 F. Supp. 3d 343 (E.D. N.C. 2015).  
The statute criminalizing major fraud against the United States sweeps broadly to cover fraud not only in the making of the contract, but also in the execution of the contract. [U.S. v. Toll](#), 804 F.3d 1344, 98 Fed. R. Evid. Serv. 1121 (11th Cir. 2015).

27           § 22.

28           18 U.S.C.A. § 1036(a), referring to 46 U.S.C.A. § 70103.

29           18 U.S.C.A. § 1040(a), referring to 42 U.S.C.A. §§ 5170, 5191.

30           38 U.S.C.A. § 1987.

31           18 U.S.C.A. § 285.

32           18 U.S.C.A. § 288.  
As to offenses against postal laws and regulations, generally, see [Am. Jur. 2d, Post Office § 93](#).

33           18 U.S.C.A. § 289.

34           18 U.S.C.A. § 290.

35           18 U.S.C.A. § 291.

36           18 U.S.C.A. § 292.

## 32 Am. Jur. 2d False Pretenses § 79

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### False Pretenses

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## VII. False Statements or Claims by, Against, or to Influence Government Officials; Related Offenses




### A. In General

#### 2. False Statement to Influence Federal Department or Agency

### § 79. False statement to influence federal department or agency, generally; what constitutes false statement

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#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  5, 18, 19  
West's Key Number Digest, [Fraud](#)  68.10(1) to 68.10(4)  
West's Key Number Digest, [United States](#)  1251 to 1297

#### A.L.R. Library

Sufficiency of proof, through one witness, to support conviction under 18 USC sec. 1001, relating to falsifying or concealing fact, or making false or fraudulent statements, etc., in matter within jurisdiction of any United States department or agency, 93 A.L.R.2d 730

Determination of loss caused by crime involving fraud or deceit, under United States Sentencing Guidelines sec. 2F1.1 (U.S.S.G.), 118 A.L.R. Fed. 585

Giving false information to federal department or agency as violation of 18 U.S.C.A. sec. 1001, making it criminal offense to make false statements in any matter under jurisdiction of department or agency of United States, 111 A.L.R. Fed. 295

Except as otherwise provided by law, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the government of the United States, knowingly and willfully:<sup>1</sup>

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;<sup>2</sup>

(2) makes any materially false, fictitious, or fraudulent statement or representation;<sup>3</sup> or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;<sup>4</sup> must be fined or imprisoned.<sup>5</sup>

To establish a violation of the statute proscribing false statements to a government agency, the government must prove that

(1) the defendant made the statement; (2) the statement was false, fictitious, or fraudulent as the defendant knew; (3) the defendant made the statement knowingly and willfully; (4) the statement was within the jurisdiction of a federal agency; and (5) the statement was material.<sup>6</sup>

The false statement required for a conviction for making false statements in a matter within the jurisdiction of a federal agency may take the form of an affirmative misrepresentation or the concealment of a material fact.<sup>7</sup> However, there must be a legal duty to disclose in order for there to be a concealment offense.<sup>8</sup>

A statement is “false” within the meaning of the statute proscribing false statements to a government agency if it contains factual misrepresentations.<sup>9</sup> Mistake or inadvertence is insufficient to prove an intent to defraud.<sup>10</sup>

A “statement” includes an oral statement<sup>11</sup> and a false document.<sup>12</sup> The false statement need not be presented directly to the department or agency.<sup>13</sup>

The statute does not apply to statements made in judicial proceedings.<sup>14</sup>

A court will not impute a recantation defense into the offense of making materially false statements to the government.<sup>15</sup> An initial final statement is sufficient to incur criminal liability for making false statements, even if the interviewee eventually recants inasmuch as there is no safe harbor for recantation or correction of a prior false statement.<sup>16</sup>

A complaint in writing to the Attorney General of the United States concerning discrimination in the matter of public accommodations or in public schools is a writing or document.<sup>17</sup>

**Practice Tip:**

The criminal statute prohibiting fraudulent or false statements does not provide a private right of action.<sup>18</sup>

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Footnotes

<sup>1</sup> 18 U.S.C.A. § 1001(a).

<sup>2</sup> 18 U.S.C.A. § 1001(a)(1).

<sup>3</sup> 18 U.S.C.A. § 1001(a)(2).

<sup>4</sup> 18 U.S.C.A. § 1001(a)(3).

<sup>5</sup> 18 U.S.C.A. § 1001(a).

<sup>6</sup> U.S. v. Hamilton, 699 F.3d 356 (4th Cir. 2012); U.S. v. Jara-Favela, 686 F.3d 289 (5th Cir. 2012); U.S. v. Siemaszko, 612 F.3d 450 (6th Cir. 2010); U.S. v. Clark, 787 F.3d 451 (7th Cir. 2015), cert. denied, 136 S. Ct. 492, 193 L. Ed. 2d 352 (2015); U.S. v. Stacks, 821 F.3d 1038 (8th Cir. 2016).  
As to matters within jurisdiction of federal department or agency, see § 81.  
As to material fact or statement, see § 80.

<sup>7</sup> U.S. v. House, 684 F.3d 1173 (11th Cir. 2012); U.S. v. Singhal, 876 F. Supp. 2d 82 (D.D.C. 2012).

<sup>8</sup> U.S. v. Singhal, 876 F. Supp. 2d 82 (D.D.C. 2012).

- <sup>9</sup> U.S. v. Stacks, 821 F.3d 1038 (8th Cir. 2016).
- <sup>10</sup> U.S. v. Alstatt, 858 F. Supp. 2d 1032 (D. Neb. 2012).
- <sup>11</sup> U.S. v. McCallum, 788 F.2d 1042, 19 Fed. R. Evid. Serv. 1716 (5th Cir. 1985).
- <sup>12</sup> U.S. v. Johnson, 937 F.2d 392 (8th Cir. 1991).
- <sup>13</sup> U.S. v. Gibson, 881 F.2d 318 (6th Cir. 1989); U.S. v. Suggs, 755 F.2d 1538 (11th Cir. 1985); U.S. v. Sprecher, 783 F. Supp. 133, 117 A.L.R. Fed. 767 (S.D. N.Y. 1992), *aff'd*, 988 F.2d 318 (2d Cir. 1993).  
As to department and agency defined, see § 77.
- <sup>14</sup> Hubbard v. U.S., 514 U.S. 695, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995).
- <sup>15</sup> U.S. v. Kim, 808 F. Supp. 2d 44 (D.D.C. 2011).
- <sup>16</sup> U.S. v. McCafferty, 801 F. Supp. 2d 605 (N.D. Ohio 2011), *aff'd*, 482 Fed. Appx. 117 (6th Cir. 2012).
- <sup>17</sup> 42 U.S.C.A. § 2000b-3, referring to 18 U.S.C.A. § 1001.
- <sup>18</sup> Unitronics (1989) (R''G) Ltd. v. Gharb, 85 F. Supp. 3d 118 (D.D.C. 2015), appeal dismissed, (D.C. Circ. 15-7036) (Dec. 9, 2015).



## 32 Am. Jur. 2d False Pretenses § 80

American Jurisprudence, Second Edition | May 2021 Update

False Pretenses

Lucas Martin, J.D.

### VII. False Statements or Claims by, Against, or to Influence Government Officials; Related Offenses


#### A. In General


##### 2. False Statement to Influence Federal Department or Agency

## § 80. Requirement that false statement to federal department or agency be material

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  5, 18, 19

West's Key Number Digest, [Fraud](#)  68.10(4)

West's Key Number Digest, [United States](#)  1259, 1295(3)

#### A.L.R. Library

[What constitutes a "material" fact for purposes of 18 U.S.C.A. sec. 1001, relating to falsifying or concealing facts in matter within jurisdiction of United States department or agency, 49 A.L.R. Fed. 622](#)

To obtain a conviction for making a false statement in a matter within the jurisdiction of the United States government, the government is required to prove not only that the defendant's statements were false, but also that they were "material," which means that the statement must have a natural tendency to influence, or be capable of influencing, the decision of the decision making body to which it was addressed,<sup>1</sup> or is capable of distracting government investigators' attention away from a critical matter.<sup>2</sup> Where a defendant's statements are intended to misdirect government investigators, they may satisfy the materiality requirement of the statute prohibiting knowingly and willfully making false statements to federal officials even if they stand no chance of accomplishing their objective.<sup>3</sup> Generally, a "material" fact need not actually influence or have been actually relied upon by, the government.<sup>4</sup> A false statement can be material even if the decision maker actually knew or should have known that the statement was false,<sup>5</sup> or even if ignored<sup>6</sup> or never read.<sup>7</sup>

### CUMULATIVE SUPPLEMENT

## Cases:

Materiality requirement, for criminal liability under False Statements Act for knowingly and willfully making or using a false statement or record in a matter within the jurisdiction of a federal agency, was satisfied, with respect to certified payroll forms submitted by defendants' company as second-tier contractor that supplied drywall workers for building construction project for federal agency, which forms were untruthful regarding contractor treating some employees as independent contractors and thereby failing to make required payroll holdings, though forms were submitted through a contractual chain, i.e., from defendants' company, to first-tier contractor, to prime contractor, and finally to the agency. 18 U.S.C.A. § 1001(a)(3). *United States v. Bazantes*, 978 F.3d 1227 (11th Cir. 2020).

Defendant correctional officer's false statement that he attempted to use a computer and printer when he was alone with inmate in unattended office with no surveillance cameras was material, as would support defendant's conviction for making materially false, fictitious, or fraudulent statements to FBI and Office of Inspector General (OIG) investigators during investigation of alleged sexual abuse of inmate; defendant's alibi was at least capable of influencing agency action, namely evidence of investigation into inmate's allegations regarding what happened in the office. 18 U.S.C.A. § 1001. *United States v. Legins*, 449 F. Supp. 3d 583 (E.D. Va. 2020).

## [END OF SUPPLEMENT]

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## Footnotes

<sup>1</sup> *Williams v. United States*, 858 F.3d 708 (1st Cir. 2017); *U.S. v. Adekanbi*, 675 F.3d 178 (2d Cir. 2012), for additional opinion, see, 472 Fed. Appx. 29 (2d Cir. 2012); *U.S. v. Hamilton*, 699 F.3d 356 (4th Cir. 2012); *U.S. v. Moore*, 708 F.3d 639 (5th Cir. 2013); *U.S. v. Clark*, 787 F.3d 451 (7th Cir. 2015), cert. denied, 136 S. Ct. 492, 193 L. Ed. 2d 352 (2015); *U.S. v. Robinson*, 809 F.3d 991 (8th Cir. 2016); *Travis v. U.S.*, 269 F.2d 928 (10th Cir. 1959), judgment rev'd on other grounds, 364 U.S. 631, 81 S. Ct. 358, 5 L. Ed. 2d 340 (1961); *United States v. Clay*, 832 F.3d 1259 (11th Cir. 2016), cert. denied, 137 S. Ct. 1814, 197 L. Ed. 2d 758 (2017); *Weinstock v. U.S.*, 231 F.2d 699 (D.C. Cir. 1956); *U.S. v. McCrudden*, 120 F. Supp. 3d 257 (E.D. N.Y. 2015), aff'd, 655 Fed. Appx. 23 (2d Cir. 2016).

<sup>2</sup> *U.S. v. Adekanbi*, 675 F.3d 178 (2d Cir. 2012), for additional opinion, see, 472 Fed. Appx. 29 (2d Cir. 2012); *U.S. v. McCrudden*, 120 F. Supp. 3d 257 (E.D. N.Y. 2015), aff'd, 655 Fed. Appx. 23 (2d Cir. 2016).

<sup>3</sup> *U.S. v. Mehanna*, 735 F.3d 32, 92 Fed. R. Evid. Serv. 1167 (1st Cir. 2013); *U.S. v. Lupton*, 620 F.3d 790 (7th Cir. 2010).  
Defendant's agitated demeanor and the semicoherent statements he was making when speaking to the decision maker at a military hospital did not make his false statement that he was the lawyer for a restricted military prisoner immaterial under the false statements statutes; delivery of the statement in a manner not likely to persuade did not affect the materiality of the statement. *U.S. v. Abraham*, 678 F.3d 370 (5th Cir. 2012).

<sup>4</sup> *U.S. v. Beer*, 518 F.2d 168 (5th Cir. 1975); *U.S. v. Clark*, 787 F.3d 451 (7th Cir. 2015), cert. denied, 136 S. Ct. 492, 193 L. Ed. 2d 352 (2015); *U.S. v. Robinson*, 809 F.3d 991 (8th Cir. 2016); *U.S. v. Boone*, 951 F.2d 1526 (9th Cir. 1991); *United States v. Clay*, 832 F.3d 1259 (11th Cir. 2016), cert. denied, 137 S. Ct. 1814, 197 L. Ed. 2d 758 (2017); *U.S. v. Kim*, 808 F. Supp. 2d 44 (D.D.C. 2011).

<sup>5</sup> *United States v. Clay*, 832 F.3d 1259 (11th Cir. 2016), cert. denied, 137 S. Ct. 1814, 197 L. Ed. 2d 758 (2017).  
Whether an interrogator had knowledge that a defendant's statements were false at the time they were made was irrelevant to the materiality of the defendant's false statements, for purpose of establishing whether a defendant knowingly and willfully made material false statements to federal officials. *U.S. v. Mehanna*, 735 F.3d 32, 92 Fed. R. Evid. Serv. 1167 (1st Cir. 2013).  
Veteran's false accounts of his military service to Department of Veterans' Affairs (VA) were "material" within meaning of federal statute prohibiting any materially false, fictitious, or fraudulent statement or representation made in connection with any matter within the jurisdiction of the federal government because those statements predictably were capable of affecting that VA's decision to award PTSD (posttraumatic stress disorder) disability benefits; the fact that the VA could have discovered that veteran's self-reported psychological symptoms were fraudulent earlier

through a more thorough search of military records did not render the VA's reliance on veteran's statements objectively unreasonable. [U.S. v. Hamilton, 699 F.3d 356 \(4th Cir. 2012\)](#).

<sup>6</sup> [U.S. v. Moore, 708 F.3d 639 \(5th Cir. 2013\)](#).

<sup>7</sup> [U.S. v. Abraham, 678 F.3d 370 \(5th Cir. 2012\)](#).

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## 32 Am. Jur. 2d False Pretenses § 81

American Jurisprudence, Second Edition | May 2021 Update

### False Pretenses

Lucas Martin, J.D.

## VII. False Statements or Claims by, Against, or to Influence Government Officials; Related Offenses

### A. In General


#### 2. False Statement to Influence Federal Department or Agency

## § 81. Matters within jurisdiction of federal department or agency for purposes of false statement

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  5, 18, 19

West's Key Number Digest, [Fraud](#)  68.10(3)

West's Key Number Digest, [United States](#)  1269 to 1273

The term “jurisdiction,” under the statute that criminalizes the knowingly and willfully making of a materially false statement in connection with a matter within the jurisdiction of a federal agency, merely incorporates Congress’s intent that the statute apply whenever false statements would result in the perversion of the authorized functions of a federal department or agency.<sup>1</sup> An agency’s jurisdiction encompasses all matters confided to the authority of an agency or department;<sup>2</sup> a department or agency has “jurisdiction” when it has the power to exercise authority<sup>3</sup> and requires a direct relationship between the authorized functions of an agency and the false statement,<sup>4</sup> but “jurisdiction” is not dependent upon whether the agency has in fact exercised that authority.<sup>5</sup>

### Observation:

“Jurisdiction,” in the statute criminalizing the making of materially false statements in matters within the jurisdiction of the United States, is construed broadly to protect the integrity of official inquiries.<sup>6</sup> Stated conversely, the term “jurisdiction” should not be given a narrow or technical meaning.<sup>7</sup>

A false statement need not be made to a federal agent to support a conviction for making a materially false statement in a matter within the jurisdiction of the United States.<sup>8</sup>

**Caution:**

It has been held that in order to convict the defendant of making a false statement in a matter within the jurisdiction of the United States government, the government was required to prove that the defendant knew, or reasonably should have known, that he was in fact speaking to a government agent at the time he made the false statement.<sup>9</sup>

Under [18 U.S.C.A. § 1001](#), which forbids knowingly and willfully making a false statement in any matter within the jurisdiction of a federal department or agency, “any matter” includes a criminal investigation.<sup>10</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Jurisdiction, for purposes of the False Statements Act, which applies to any matter within the jurisdiction of the executive branch of the federal government, does not admit of a constricted construction, but instead the statutory language covers all matters confided to the authority of an agency or department. [18 U.S.C.A. § 1001](#). [United States v. Bazantes, 978 F.3d 1227 \(11th Cir. 2020\)](#).

### [END OF SUPPLEMENT]

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### Footnotes

- <sup>1</sup> [U.S. v. Rahman, 805 F.3d 822 \(7th Cir. 2015\)](#).  
As to department and agency defined, see [§ 77](#).
- <sup>2</sup> [U.S. v. House, 684 F.3d 1173 \(11th Cir. 2012\)](#).
- <sup>3</sup> [U.S. v. Ford, 639 F.3d 718 \(6th Cir. 2011\)](#); [U.S. v. Rahman, 805 F.3d 822 \(7th Cir. 2015\)](#); [U.S. v. King, 660 F.3d 1071 \(9th Cir. 2011\)](#); [U.S. v. House, 684 F.3d 1173 \(11th Cir. 2012\)](#).
- <sup>4</sup> [U.S. v. King, 660 F.3d 1071 \(9th Cir. 2011\)](#).
- <sup>5</sup> [U.S. v. Rahman, 805 F.3d 822 \(7th Cir. 2015\)](#).
- <sup>6</sup> [U.S. v. King, 660 F.3d 1071 \(9th Cir. 2011\)](#).
- <sup>7</sup> [U.S. v. Ford, 639 F.3d 718 \(6th Cir. 2011\)](#).
- <sup>8</sup> [U.S. v. King, 660 F.3d 1071 \(9th Cir. 2011\)](#).  
The presence of a member of the Bureau of Alcohol, Tobacco, and Firearms (ATF) at the scene of a fire at time that the defendant made his statement to a local official was enough to provide federal “jurisdiction,” under the statute that criminalized knowingly and willfully the making of a materially false statement in connection with a matter within the jurisdiction of the federal agency; many agencies were involved in the investigation of the fire, ATF had power to exercise authority over that fire damaged property, and other investigators shared information and discussed theories regarding the fire during the course of the investigation. [U.S. v. Rahman, 805 F.3d 822 \(7th Cir. 2015\)](#).
- <sup>9</sup> [U.S. v. Binette, 945 F. Supp. 2d 223 \(D. Mass. 2013\)](#).

<sup>10</sup> [U.S. v. Rodgers](#), 466 U.S. 475, 104 S. Ct. 1942, 80 L. Ed. 2d 492 (1984) (the statute encompasses criminal investigations conducted by the Federal Bureau of Investigation and the Secret Service, since nothing in the legislative history indicated Congress intended a restricted reach of the statute).

## 32 Am. Jur. 2d False Pretenses § 82

American Jurisprudence, Second Edition | May 2021 Update

False Pretenses

Lucas Martin, J.D.

### VII. False Statements or Claims by, Against, or to Influence Government Officials; Related Offenses

#### A. In General

##### 2. False Statement to Influence Federal Department or Agency

## § 82. “Exculpatory no” exception to prohibition against making false statement to federal department or agency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West’s Key Number Digest

West’s Key Number Digest, [False Pretenses](#)  5, 18, 19

West’s Key Number Digest, [United States](#)  1251 to 1297

#### A.L.R. Library

[What statements fall within exculpatory denial exception to prohibition, under 18 U.S.C.A. sec. 1001, against knowingly and willfully making false statement which is material to matter within jurisdiction of department or agency of United States, 102 A.L.R. Fed. 742](#)

Some courts have found an “exculpatory no” exception to [18 U.S.C.A. § 1001](#) in situations where a person made a false denial of guilt of a criminal offense, if such denial was made in response to an investigator’s question.<sup>1</sup> The exception is limited to simple negative answers made while the accused is under investigation and without affirmative, discursive falsehoods.<sup>2</sup>

#### Caution:

It has been held that the federal statute imposing criminal liability for making false statements to federal investigators does not include an exception for a false statement that consists of a mere denial of wrongdoing, the so-called “exculpatory no.”<sup>3</sup>

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Footnotes

- <sup>1</sup> U.S. v. Marusich, 637 F. Supp. 521 (S.D. Cal. 1986).
- <sup>2</sup> U.S. v. Moore, 27 F.3d 969, 40 Fed. R. Evid. Serv. 1302 (4th Cir. 1994); U.S. v. King, 613 F.2d 670, 5 Fed. R. Evid. Serv. 720, 56 A.L.R. Fed. 159 (7th Cir. 1980).
- <sup>3</sup> U.S. v. Lupton, 620 F.3d 790 (7th Cir. 2010).

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## 32 Am. Jur. 2d False Pretenses VII B Refs.

American Jurisprudence, Second Edition | May 2021 Update

### False Pretenses

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## VII. False Statements or Claims by, Against, or to Influence Government Officials; Related Offenses

### B. False Claims Act

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#) 🔑 18, 19

West's Key Number Digest, [Fraud](#) 🔑 68.10(1) to 68.10(4)

West's Key Number Digest, [United States](#) 🔑 1251 to 1297

### A.L.R. Library

A.L.R. Index, False Pretenses

A.L.R. Index, Fraud and Deceit

West's A.L.R. Digest, [False Pretenses](#) 🔑 18, 19

West's A.L.R. Digest, [Fraud](#) 🔑 68.10(1) to 68.10(4)

West's A.L.R. Digest, [United States](#) 🔑 1251 to 1297

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## 32 Am. Jur. 2d False Pretenses § 83

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False Pretenses

Lucas Martin, J.D.

### VII. False Statements or Claims by, Against, or to Influence Government Officials; Related Offenses


#### B. False Claims Act

##### 1. In General

## § 83. Liability for false claim under False Claims Act

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#)  18, 19

West's Key Number Digest, [Fraud](#)  68.10(1) to 68.10(4)

West's Key Number Digest, [United States](#)  1251 to 1292

#### A.L.R. Library

[When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes, 77 A.L.R.3d 689](#)

[Construction and Application of False Claims Act—Supreme Court Cases, 37 A.L.R. Fed. 2d 543](#)

[Construction and Application of “Reverse False Claim Provision” of False Claims Act \(31 U.S.C.A. s 3729\(a\)\(7\)\), 162 A.L.R. Fed. 147](#)

[When does statute of limitations begin to run in action under False Claims Act \(31 U.S.C.A. secs. 3729-3733\), 139 A.L.R. Fed. 645](#)

[Corporation's vicarious liability for fraud of its agent under False Claims Act \(31 U.S.C.A. secs. 3729-3733\), 107 A.L.R. Fed. 665](#)

#### Trial Strategy

[Proof of Violation Under the False Claims Act, 78 Am. Jur. Proof of Facts 3d 357](#)

#### Forms

Forms relating to false claims, generally, see Am. Jur. Pleading and Practice Forms, Public Works and Contracts; Am. Jur. Pleading and Practice Forms, Social Security and Medicare; Am. Jur. Pleading and Practice Forms, United States; Am. Jur. Pleading and Practice Forms, Vendor and Purchaser [\[Westlaw®\(r\) Search Query\]](#)

The False Claims Act (FCA) was enacted to protect and indemnify the government against losses caused by fraud;<sup>1</sup> it is intended to reach all types of fraud, without qualification, that might result in financial loss to the government.<sup>2</sup>

Specifically, under statute, subject to law pertaining to reduced damages, any person who<sup>3</sup>—

- knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.<sup>4</sup>
- knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.<sup>5</sup>
- conspires to commit such statutory violation.<sup>6</sup>
- has possession, custody, or control of property or money used, or to be used, by the government and knowingly delivers, or causes to be delivered, less than all of that money or property.<sup>7</sup>
- is authorized to make or deliver a document certifying receipt of property used, or to be used, by the government and, intending to defraud the government, makes or delivers the receipt without completely knowing that the information on the receipt is true.<sup>8</sup>
- knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the government, or a member of the Armed Forces, who lawfully may not sell or pledge property.<sup>9</sup>
- knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government,<sup>10</sup> is liable to the United States government for a civil penalty.<sup>11</sup>

Actionable fraud is limited to the classes or acts specifically enumerated in the FCA.<sup>12</sup> The FCA is not an all-purpose antifraud statute, or a vehicle for punishing garden-variety breaches of contract or regulatory violations.<sup>13</sup>

Liability under the FCA attaches to each claim submitted to the government under a contract so long as the original contract was obtained through false statements or fraudulent conduct.<sup>14</sup> Specifically, a cause of action exists under the FCA if a government contractor makes a false statement to induce a government entity to award a grant or contract to that contractor, and which is awarded based on this false statement, in that all resulting requests for payment are then fraudulent because they are based on the original false statement.<sup>15</sup>

#### Observation:

Despite its broad reach, the FCA is not a vehicle to police technical compliance with complex federal regulations;<sup>16</sup> it is not a general enforcement device for federal statutes, regulations, and contracts.<sup>17</sup> The FCA, even in its broadest application, was never intended to be used as a backdoor regulatory regime to restrict practices that the relevant federal and state agencies have chosen not to prohibit through their regulatory authority.<sup>18</sup>

An individual or entity that does not directly submit a false claim to the government may still be liable under the FCA.<sup>19</sup> The focus of the FCA remains on those who present or directly induce the submission of false or fraudulent claims.<sup>20</sup> The FCA does not foreclose actions based on false claims that are transmitted to the government by means of an intermediary, such as a government contractor<sup>21</sup> or a subcontractor.<sup>22</sup> The FCA is quite extensive in its coverage and is intended to reach any person

who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.<sup>23</sup> To determine whether a defendant who did not actually submit a claim or make a false statement has caused the submission of the false claim or false statement, a court must look at the degree to which that party was involved in the scheme that results in actual submission.<sup>24</sup>

Whenever the Attorney General, or a designee, has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil proceeding under statute or other false claims law, or making an election to proceed with an action filed by a private person, issue in writing and cause to be served upon such person, a civil investigative demand.<sup>25</sup> An action may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by statute occurred.<sup>26</sup> A summons as required by the Federal Rules of Civil Procedure must be issued by the appropriate district court and served at any place within or outside the United States.<sup>27</sup>

A civil action may not be brought<sup>28</sup> (1) more than six years after the date on which the violation of the FCA is committed,<sup>29</sup> or (2) more than three years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,<sup>30</sup> whichever occurs last.<sup>31</sup>

If the government elects to intervene and proceed with an action filed by a private person the government may file its own complaint or amend the complaint of the person who has brought such private action to clarify or add detail to the claims in which the government is intervening and to add any additional claims with respect to which the government contends it is entitled to relief.<sup>32</sup> For statute of limitations purposes, any such government pleading must relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.<sup>33</sup>

**Practice Tip:**

The United States must be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.<sup>34</sup> Additionally, a criminal conviction of conspiracy to defraud the government by filing false claims will conclusively establish liability in a civil claim under the FCA and will estop a denial of liability.<sup>35</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

False Claims Act's (FCA) limitations discovery rule, under which a civil action alleging that a person presented a false claim to the federal government may be brought within three years after the United States official charged with responsibility to act knew or should have known the relevant facts, but cannot be brought more than ten years after the violation, applies to a qui tam civil action in which the United States does not intervene; abrogating *United States ex rel. Sanders v. North Am. Bus Industries, Inc.*, 546 F. 3d 288, and *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F. 3d 702. 31 U.S.C.A. §§ 3729(a), (b)(2), 3730(b), 3731(b)(2). *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019).

If the United States does not intervene in a qui tam civil action under the False Claims Act (FCA) alleging that a person presented a false claim to the federal government, the limitations period commences under the FCA's limitations discovery

rule when the United States official charged with responsibility to act knew or should have known the relevant facts, not when the qui tam relator knew or should have known the relevant facts; abrogating *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 31 U.S.C.A. §§ 3729(a), (b)(2), 3730(b), 3731(b)(2). *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019).

A private qui tam relator is not an official of the United States in the ordinary sense of that phrase, for purposes of the False Claims Act's (FCA) limitations discovery rule, under which a civil action alleging that a person presented a false claim to the federal government may be brought within three years after the United States official charged with responsibility to act knew or should have known the relevant facts, but cannot be brought more than ten years after the violation; a relator is neither appointed as an officer of the United States nor employed by the United States. U.S. Const. art. 2, § 2, cl. 2; 31 U.S.C.A. §§ 3729(a), (b)(2), 3730(b), 3731(b)(2). *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019).

Defendant's false representations to Medicare that the neurological testing being performed at her husband's healthcare company was being supervised by a licensed neurologist satisfied materiality element of government's claim against her under the False Claims Act (FCA); Medicare regulations precluded payment of diagnostic neurological testing claims without certification of a supervising neurologist, and there was no evidence that Medicare generally paid such claims despite knowing that the regulations were violated. 31 U.S.C.A. §§ 3729(a)(1)(A), 3729(a)(1)(B). *United States ex rel. Doe v. Heart Solution, PC*, 918 F.3d 300 (3d Cir. 2019).

Hospice organizations' alleged fraudulent certifications of compliance with statutory and regulatory Medicare requirements of certification, face-to-face encounter, and plan-of-care were material violations, as required to impose liability on organizations under False Claims Act (FCA); certification requirements that organizations allegedly violated were listed in Medicare statute as conditions of payment for hospice services, Government would have denied Medicare payment to organizations if it had known of allegedly false certifications, and Government would have attached importance to underlying violations involving continuous home care, which was costliest care among hospice services. 31 U.S.C.A. § 3729(a)(1)(A, B), (b)(4); Social Security Act § 1814, 42 U.S.C.A. § 1395f(a)(7); 42 C.F.R. § 418.22(b). *United States ex rel. Lemon v. Nurses To Go, Incorporated*, 924 F.3d 155 (5th Cir. 2019).

A reasonable difference of opinion among physicians reviewing medical documentation ex post facto is not sufficient on its own to suggest that a physician's clinical judgment regarding the patient's illness, or any claims for Medicare hospice benefits based on them, are false, as would trigger False Claims Act (FCA) liability under the false-certification theory; a properly formed and sincerely held clinical judgment is not untrue even if a different physician later contends that the judgment is wrong. 31 U.S.C.A. § 3729(a)(1); Social Security Act § 1814, 42 U.S.C.A. § 1395f(7); 42 C.F.R. § 418.22(b). *United States v. AseraCare, Inc.*, 938 F.3d 1278 (11th Cir. 2019).

Medical clinic operator was not liable under the False Claims Act (FCA) for improperly billing federal payors for injection administration fees which should have been bundled with office visits, where the only way that federal payors would have paid for such fees was if a medical modifier code was added, signifying that the injection was of higher complexity level, requiring separate diagnosis than diagnosis attached to the office visit, and there was no evidence medical coders were using injection administration codes containing the modifier, and thus there was no evidence that operator presented fraudulent claims which unbundled the injection administrations. 31 U.S.C.A. § 3729. *United States ex rel. Salters v. American Family Care, Inc.*, 262 F. Supp. 3d 1266 (N.D. Ala. 2017).

Medical clinic operator did not have False Claims Act (FCA) liability under provision of FCA allowing a cause of action against a provider who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval, for allegedly making direct false claim with regard to its use of improper billing code in billing Medicare for "ear popper" device, a hand-held, non-invasive air puffer, where there was no evidence that operator knew that it was improperly billing for ear poppers. 31 U.S.C.A. § 3729(a)(1)(A). *United States ex rel. Salters v. American Family Care, Inc.*, 262 F. Supp. 3d 1266 (N.D. Ala. 2017).

United States adequately alleged that claims for alternative chelation therapy that were submitted to Medicare by defendants, medical clinic and physician, were factually false, so as to support claims under False Claims Act (FCA) for presentment of false claims and use of false document to submit false claims; United States alleged that defendants presented claims with diagnosis codes that were unsupported, including codes for lead poisoning, that patients for whom claims were submitted

were not diagnosed with, or treated for, lead poisoning, United States provided several examples and dates of such claims, and United States alleged that defendants ordered chelation therapy knowing that course of treatment was unnecessary. 31 U.S.C.A. §§ 3729(a)(1), 3729(a)(2). *United States v. Adams*, 371 F. Supp. 3d 1195 (N.D. Ga. 2019).

Patient sufficiently alleged that producer of at-home blood testing kits for patients on blood-thinning medication that was covered by Medicare billed Medicare for tests that were not performed, supporting false certification claim under the False Claims Act (FCA); patient alleged that on two occasions producer billed Medicare for patient's tests that were not performed. 31 U.S.C.A. § 3729 et seq. *United States ex rel. Allen v. Alere Home Monitoring, Inc.*, 334 F. Supp. 3d 349 (D. Mass. 2018).

Nursing home that provided at least slight care to promotion of quality of life was not grossly negligent, and therefore False Claims Act (FCA) claim was not supported under worthless services theory; resident with scabies was treated for scabies, resident with bed sores was usually turned every two hours, resident who suffered severe injuries from fall was given emergency room treatment after she fell, and patient with maggots in his wound had maggots cleaned out. 31 U.S.C.A. § 3729(a)(1). *United States ex rel. Jackson v. DePaul Health System*, 454 F. Supp. 3d 481, 112 Fed. R. Evid. Serv. 196 (E.D. Pa. 2020).

#### [END OF SUPPLEMENT]

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#### Footnotes

- <sup>1</sup> *United States v. Marder*, 208 F. Supp. 3d 1296 (S.D. Fla. 2016); *United States ex rel. Forcier v. Computer Sciences Corp.*, 183 F. Supp. 3d 510 (S.D. N.Y. 2016); *United States ex rel. Harman v. Trinity Industries, Inc.*, 166 F. Supp. 3d 737 (E.D. Tex. 2015).  
The False Claims Act (FCA) seeks to protect the funds and property of the government from fraudulent claims. *U.S. ex rel. Heath v. Wisconsin Bell, Inc.*, 111 F. Supp. 3d 923 (E.D. Wis. 2015).
- <sup>2</sup> *United States v. Spectrum, Inc.*, 113 F. Supp. 3d 238 (D.D.C. 2015); *U.S. ex rel. Bierman v. Orthofix Intern., N.V.*, 113 F. Supp. 3d 414 (D. Mass. 2015).  
The FCA is designed to discourage contractor fraud against the federal government. *Dunn v. Millirons*, 176 F. Supp. 3d 591 (W.D. Va. 2016), *aff'd*, 675 Fed. Appx. 314 (4th Cir. 2017).  
The FCA covers all fraudulent attempts to cause the government to pay out sums of money. *United States v. Stevens-Henager College*, 174 F. Supp. 3d 1297 (D. Utah 2016).
- <sup>3</sup> 31 U.S.C.A. § 3729(a)(1), referring to 31 U.S.C.A. § 3729(a)(2).
- <sup>4</sup> 31 U.S.C.A. § 3729(a)(1)(A).
- <sup>5</sup> 31 U.S.C.A. § 3729(a)(1)(B).
- <sup>6</sup> 31 U.S.C.A. § 3729(a)(1)(C), referring to 31 U.S.C.A. § 3729(a)(1)(A), (B), (D), (E), (F), (G).
- <sup>7</sup> 31 U.S.C.A. § 3729(a)(1)(D).
- <sup>8</sup> 31 U.S.C.A. § 3729(a)(1)(E).
- <sup>9</sup> 31 U.S.C.A. § 3729(a)(1)(F).
- <sup>10</sup> 31 U.S.C.A. § 3729(a)(1)(G).
- <sup>11</sup> 31 U.S.C.A. § 3729(a)(1).
- <sup>12</sup> *McCrary v. Knox County, Indiana*, 200 F. Supp. 3d 782 (S.D. Ind. 2016); *United States ex rel. Kolchinsky v. Moody's Corp.*, 238 F. Supp. 3d 550, 97 Fed. R. Serv. 3d 462 (S.D. N.Y. 2017).

- 13 United States v. Lang, 2017 WL 1449674 (E.D. N.C. 2017).
- 14 United States ex rel. Miller v. Weston Educational, Inc., 840 F.3d 494, 336 Ed. Law Rep. 699 (8th Cir. 2016).
- 15 United States ex rel. McGee v. IBM Corporation, 81 F. Supp. 3d 643 (N.D. Ill. 2015).
- 16 United States v. Marder, 208 F. Supp. 3d 1296 (S.D. Fla. 2016).
- 17 United States ex rel. Kolchinsky v. Moody's Corp., 238 F. Supp. 3d 550, 97 Fed. R. Serv. 3d 462 (S.D. N.Y. 2017).
- 18 U.S. ex rel. Polansky v. Pfizer, Inc., 822 F.3d 613 (2d Cir. 2016).
- 19 United States v. Marder, 208 F. Supp. 3d 1296 (S.D. Fla. 2016).  
The FCA applies to anyone who knowingly assists in causing the government to pay claims grounded in fraud, without regard to whether that person has direct contractual relations with the government. *U.S. v. Planned Parenthood Gulf Coast, Inc.*, 21 F. Supp. 3d 825 (S.D. Tex. 2014).
- 20 United States v. Northern Adult Daily Health Care Center, 205 F. Supp. 3d 276 (E.D. N.Y. 2016).
- 21 United States ex rel. Kolchinsky v. Moody's Corporation, 162 F. Supp. 3d 186 (S.D. N.Y. 2016).
- 22 United States ex rel. Keaveney v. SRA International, Inc., 219 F. Supp. 3d 129 (D.D.C. 2016).
- 23 U.S. ex rel. Bartlett v. Ashcroft, 39 F. Supp. 3d 656 (W.D. Pa. 2014).
- 24 United States ex. rel. Scollick v. Narula, 215 F. Supp. 3d 26 (D.D.C. 2016).
- 25 31 U.S.C.A. § 3733(a)(1), referring to 31 U.S.C.A. § 3730.
- 26 31 U.S.C.A. § 3732(a), referring to 31 U.S.C.A. §§ 3729, 3730.
- 27 31 U.S.C.A. § 3732(a).
- 28 31 U.S.C.A. § 3731(b), referring to 31 U.S.C.A. § 3730.
- 29 31 U.S.C.A. § 3731(b)(1), referring to 31 U.S.C.A. § 3729.
- 30 31 U.S.C.A. § 3731(b)(2).
- 31 31 U.S.C.A. § 3731(b).
- 32 31 U.S.C.A. § 3731(c), referring to 31 U.S.C.A. § 3730(b).  
As to intervention in a qui tam action, see § 85.
- 33 31 U.S.C.A. § 3731(c).
- 34 31 U.S.C.A. § 3731(d), referring to 31 U.S.C.A. § 3730.
- 35 U.S. v. Uzzell, 648 F. Supp. 1362 (D.D.C. 1986).

## 32 Am. Jur. 2d False Pretenses § 84

American Jurisprudence, Second Edition | May 2021 Update

### False Pretenses

Lucas Martin, J.D.

## VII. False Statements or Claims by, Against, or to Influence Government Officials; Related Offenses

### B. False Claims Act

#### 1. In General

## § 84. Definition of false claim under False Claims Act; examples

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#) 18, 19

West's Key Number Digest, [Fraud](#) 68.10(1) to 68.10(4)

West's Key Number Digest, [United States](#) 1251 to 1254, 1257

### A.L.R. Library

[When is claim "upon or against the United States" so as to sustain civil liability under False Claims Act \(31 U.S.C.A. sec. 231\), 59 A.L.R. Fed. 886](#)

The term "claim" means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that is presented to an officer, employee, or agent of the United States; or is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the government's behalf or to advance a government program or interest, and if the United States government provides or has provided any portion of the money or property requested or demanded; or will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.<sup>1</sup> However, the term "claim" does not include requests or demands for money or property that the government has paid to an individual as compensation for federal employment or as an income subsidy with no restrictions on that individual's use of the money or property.<sup>2</sup>

False claims include—

- insurance claim forms.<sup>3</sup>
- transactions involving demands for the payment of money by the government other than loans.<sup>4</sup>
- food stamps obtained through illegal means.<sup>5</sup>
- certificates submitted according to participation in a federal program.<sup>6</sup>
- hospice certification provisions of the Medicare statute and accompanying regulation.<sup>7</sup>



However, false claims have been held not to include—

- an application for a government guaranty of a loan from a private lending institution, as long as the government is not required to pay anything on the guaranty;<sup>8</sup> there is an exception, however, if the government is fraudulently induced to guarantee a loan from a lending institution and is ultimately required to pay on the guaranty.<sup>9</sup>
- the marketing of drugs in violation of the Federal Food, Drug, and Cosmetic Act.<sup>10</sup>
- a home mortgagor's claim that banks had avoided paying certain taxes to the United States.<sup>11</sup>

An allegation that services provided to the federal government, pursuant to contract, were “worth less” than what the government paid, is insufficient to state a claim for relief under the False Claims Act (FCA).<sup>12</sup>

The “implied false certification theory,” providing that when a defendant submits a claim it impliedly certifies compliance with all conditions of payment, can be a basis for liability under the FCA, at least where two conditions are satisfied: (1) the claim does not merely request payment, but also makes specific representations about the goods or services provided; and (2) the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.<sup>13</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

The False Claims Act (FCA) does not require a plaintiff to plead an objective falsehood in the claim submitted for government payment. 31 U.S.C.A. § 3729(a)(1). *Winter ex rel. United States v. Gardens Regional Hospital and Medical Center, Inc.*, 953 F.3d 1108 (9th Cir. 2020).

Government contractor that provided energy-saving improvements to Army buildings did not knowingly make a false claim with regard to savings calculated upon “electrical baseline adjustment,” and thus scienter element of claim under False Claims Act was not satisfied; contractor disclosed the electrical baseline adjustment and the components of its calculations to Army. 31 U.S.C.A. § 3729 et seq. *United States ex rel. Berg v. Honeywell International, Inc.*, 740 Fed. Appx. 535 (9th Cir. 2018).

There are two major variations of the fraudulent inducement theory of a claim's legal falsity under the False Claims Act (FCA): one of these requires that a party make promises at the time of contracting that it intends to break, while the other requires that false statements induced the government to make the initial contract or caused it to agree on particular contract terms or modifications. 31 U.S.C.A. § 3729(a)(1)(A). *United States ex rel. Morsell v. Symantec Corporation*, 471 F. Supp. 3d 257 (D.D.C. 2020).

## [END OF SUPPLEMENT]

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### Footnotes

<sup>1</sup> 31 U.S.C.A. § 3729(b)(2)(A).

<sup>2</sup> 31 U.S.C.A. § 3729(b)(2)(B).

<sup>3</sup> *U.S. v. Lorenzo*, 768 F. Supp. 1127 (E.D. Pa. 1991).

<sup>4</sup> *Scolnick v. U.S.*, 331 F.2d 598 (1st Cir. 1964); *U.S. v. Bouchey*, 860 F. Supp. 890 (D.D.C. 1994).  
The False Claims Act applies to situations in which a person falsely convinces the government to pay out funds or to pay out too much in funds. It also applies to situations in which a person fraudulently pays too little to the government. *U.S. v. Douglas*, 626 F. Supp. 621 (E.D. Va. 1985).

- <sup>5</sup> U.S. v. Truong, 860 F. Supp. 1137 (E.D. La. 1994).
- <sup>6</sup> Ab-Tech Const., Inc. v. U.S., 31 Fed. Cl. 429 (1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995).
- <sup>7</sup> Druding v. Care Alternatives, Inc., 164 F. Supp. 3d 621 (D.N.J. 2016).
- <sup>8</sup> U.S. v. Hill, 676 F. Supp. 1158 (N.D. Fla. 1987).
- <sup>9</sup> U.S. v. Ettrick Wood Products, Inc., 774 F. Supp. 544 (W.D. Wis. 1988), *adopted in part*, 683 F. Supp. 1262 (W.D. Wis. 1988).
- <sup>10</sup> United States ex. rel. Kelly v. Novartis Pharmaceuticals Corporation, 827 F.3d 5 (1st Cir. 2016).
- <sup>11</sup> Walsh v. JPMorgan Chase Bank, NA, 75 F. Supp. 3d 256 (D.D.C. 2014).
- <sup>12</sup> United States v. Unisys Corporation, 178 F. Supp. 3d 358 (E.D. Va. 2016).
- <sup>13</sup> Universal Health Services, Inc. v. U.S., 136 S. Ct. 1989, 195 L. Ed. 2d 348 (2016).  
Presentment claims under the FCA take a variety of forms and do not necessarily require any affirmatively false statement; rather, a presentment claim can also rest upon a false certification theory. *United States ex rel. Tran v. Computer Sciences Corporation*, 53 F. Supp. 3d 104 (D.D.C. 2014).

## 32 Am. Jur. 2d False Pretenses § 85

American Jurisprudence, Second Edition | May 2021 Update

### False Pretenses

Lucas Martin, J.D.

## VII. False Statements or Claims by, Against, or to Influence Government Officials; Related Offenses

### B. False Claims Act

#### 1. In General

## § 85. Civil action for false claim under False Claims Act; qui tam action

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [False Pretenses](#) 18, 19

West's Key Number Digest, [Fraud](#) 68.10(1) to 68.10(4)

West's Key Number Digest, [United States](#) 1251 to 1254, 1262 to 1268, 1279, 1280

### A.L.R. Library

[Validity, Construction, and Application of False Claims Act's "First to File" Rule, 31 U.S.C.A. s3730\(b\)\(5\), 11 A.L.R. Fed. 3d Art. 4](#)

[Specific intent to defraud Government as necessary to impose liability under provisions of False Claims Act \(31 U.S.C.A. sec. 231\) pertaining to "false" or "fictitious" claims or statements, 26 A.L.R. Fed. 307](#)

The False Claims Act (FCA) prohibits false or fraudulent claims for payment to the United States, and authorizes civil actions to remedy such fraud to be brought by the Attorney General or by private individuals in the government's name.<sup>1</sup>

The Attorney General diligently must investigate a violation of the false claims statute.<sup>2</sup> If the Attorney General finds that a person has violated or is violating such statute, the Attorney General may bring a civil action against the person.<sup>3</sup>

Additionally, under the FCA, private individuals, referred to as "relators," may file qui tam civil actions on behalf of the United States for the making of a false claim against government funds.<sup>4</sup> As provided by statute, a person may bring a civil action for a violation of the false claims statute for the person and for the United States government.<sup>5</sup> The action must be brought in the name of the government.<sup>6</sup> FCA relators have standing to bring an FCA action because the FCA effects a partial assignment of the government's damages claim and thus statutorily vests private citizens with standing.<sup>7</sup> However, a relator in a qui tam FCA action does not have standing to assert common law claims based upon injury sustained by the United States.<sup>8</sup>

**Observation:**

Although designed to incentivize whistleblowers, the FCA also seeks to stifle parasitic lawsuits.<sup>9</sup>

A relator bringing FCA claims on behalf of the United States must be represented by counsel.<sup>10</sup> Pro se plaintiffs are not adequately able to represent the interests of the United States, as relators in a qui tam action under the FCA.<sup>11</sup>

**Practice Tip:**

When bringing a qui tam action under the FCA, a relator need not allege a personal injury; rather, the relator can bring suit to remedy an injury in fact suffered by the United States.<sup>12</sup>

The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.<sup>13</sup> However, the requirement that the Attorney General consent to the dismissal of an FCA suit applies only to voluntary dismissals<sup>14</sup> and does not prevent a court from dismissing an FCA action, without prejudice, without obtaining the Attorney General's consent.<sup>15</sup>

A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses must be served on the government.<sup>16</sup>

On a qui tam action brought on behalf of the government under the FCA, the government may choose to intervene and prosecute the action or allow the relator to proceed alone.<sup>17</sup> Specifically, under statute, the government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.<sup>18</sup> Before the expiration of the 60-day period or any extensions, the government must proceed with the action, in which case the action must be conducted by the government; or notify the court that it declines to take over the action, in which case the person bringing the action has the right to conduct the action.<sup>19</sup> When the government elects to intervene in an action brought by a relator under the FCA, the government's claims become the operative claims insofar as they are duplicative of those of the relator<sup>20</sup> but the relator retains the right to continue as a party to the action.<sup>21</sup> Even where the government declines to intervene, the United States is the real party in interest in any FCA suit;<sup>22</sup> the action is still technically on behalf of the United States.<sup>23</sup>

Under the FCA's first-to-file bar, a relator may not bring a related action based on the facts underlying a pending action.<sup>24</sup> Under statute, when a person brings an action, no person other than the government may intervene or bring a related action based on the facts underlying the pending action.<sup>25</sup> Because a case ceases to be pending, for purposes of the FCA first-to-file bar, once decided or dismissed, a dismissal under the first-to-file bar must be without prejudice to refile once the earlier action is no longer pending.<sup>26</sup> The FCA's "first-to-file rule" bars a later-filed related action that alleges all the essential facts or the same elements of a fraud described in an earlier-filed complaint while that complaint is still pending.<sup>27</sup> A difference in the type of scheme alleged in an FCA action, and a prior, pending FCA action, is insufficient to avoid the FCA's first-to-file bar; the focus must be on the commonality of the facts in the earlier and later cases.<sup>28</sup> Whether an action is brought in contravention of the FCA's first-to-file bar is a question of fact.<sup>29</sup> The first-to-file bar is jurisdictional.<sup>30</sup>

**Observation:**

The first-to-file bar on qui tam actions under the FCA operates on the recognition that, because relators can bring suit without having suffered a personal injury, countless plaintiffs in theory could file a qui tam action based on the same fraud and then share in the proceeds, and if multiple relators could split the recovery for the same conduct, they would have less incentive to bring a qui tam action in the first place.<sup>31</sup>

The FCA does not allow qui tam suits by private relators against states or state agencies.<sup>32</sup> However, a qui tam plaintiff, also known as a relator, may bring a civil action for a violation of the FCA seeking to hold individual state employees personally liable for their knowing participation in the submission of false or fraudulent claims to the United States, for herself and for the United States government, in the name of the government.<sup>33</sup>

If the government proceeds with an action brought by a private person under statute, such person must receive at least 15% but not more than 25% of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.<sup>34</sup> However, where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10% of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation.<sup>35</sup> The statutory minimum 15% incentive compensation for filing a qui tam action under the FCA is paid to a relator even if that person does nothing more than file the action in federal court.<sup>36</sup> Increased awards beyond the statutory minimum 15% to a relator in a qui tam action under the FCA are provided for greater assistance, such as in those cases where the person carefully develops all the facts and supporting documentation necessary to make the case required by law, and where that person continues to play an active and constructive role in the litigation that leads ultimately to a successful recovery to the United States Treasury.<sup>37</sup> The statutory maximum 25% award to a relator in a qui tam action under the FCA is reserved for relators who actively and uniquely assist the government in the prosecution of the case.<sup>38</sup> Even assuming that the proceeds-of-the-action language of the FCA, which provides that the relators are entitled to a share of “the proceeds of the action or settlement of the claim” when the government intervenes in a qui tam action initiated by the relators, applies in the case of settlement, the phrase “proceeds of the action” does not encompass claims not brought by the relators.<sup>39</sup>

If the government does not proceed with an action brought by a private person, the person bringing the action or settling the claim must receive an amount which the court decides is reasonable for collecting the civil penalty and damages.<sup>40</sup> The amount may not be less than 25% and not more than 30% of the proceeds of the action or settlement and must be paid out of such proceeds.<sup>41</sup> Reductions in the share are provided for in the case where the private person participates in the violation under statute,<sup>42</sup> even if the relator was only a minor participant in the fraud.<sup>43</sup>

If the government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorney’s fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.<sup>44</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Qui tam relators’ allegations, that government contractor charged United States Army for personnel who were not qualified for the positions hired, failed to sufficiently allege materiality to the Army, as required to support claim for false presentment of claim, in violation of False Claims Act (FCA); although relators alleged that many of the workers did not have the ability to speak English, government contract at issue required only that all contractor employees either be literate in English or have

access to a translator, and although relators further alleged that the workers were not always working within their job descriptions, there was no indication that contractor lacked the flexibility to adjust roles, or that such adjustments were material to the Army's payment of the claims. 31 U.S.C.A. § 3729(a)(1)(A). *United States ex rel. Hutchins v. DynCorp International, Inc.*, 342 F. Supp. 3d 32 (D.D.C. 2018).

In qui tam action under False Claims Act (FCA) against defunct for-profit law school and corporation that owned it, alleging fraudulent conduct in connection with federal student loan funding, relator in later-filed complaint could not avoid False Claims Act first-to-file bar, where first-filed action was related to instant action; the first-filed action alleged the exact same scheme by defendants, and the allegations in both actions were almost identical but directed at different but related parties. 31 U.S.C.A. § 3730(b)(5). *United States ex rel. Bernier v. Infilaw Corporation*, 347 F. Supp. 3d 1075 (M.D. Fla. 2018).

Qui tam relator, by failing to identify what false record or statement was made or used, failed to state a claim for violation of False Claims Act (FCA) by knowingly making, using, or causes to be made or used a false record or statement material to a false or fraudulent claim, in action alleging that individual defendant and anesthesia companies owned by him sought Medicare reimbursement for anesthesia services that were tainted by kickbacks, for referrals, paid to defendant ambulatory surgical centers (ASC) owned by him. 31 U.S.C.A. § 3729(a)(1)(B); Social Security Act § 1128B(b, g), 42 U.S.C.A. § 1320a-7b(b, g). *United States v. Choudhry*, 262 F. Supp. 3d 1299 (M.D. Fla. 2017).

Relators failed to sufficiently allege that health system that owned majority of shares in hospital and sought to change hospital's ownership structure willfully paid improper remuneration to physician-investors when it exercised statutory rescission process under Texas Securities Act (TSA) to buy out investors' interests, as required to state False Claims Act (FCA) claim under the Anti-Kickback Statute (AKS); while relators asserted that rescission was the "weapon of choice" for pushing out investors, willfulness required a specific intent to do something forbidden by law, and relators allegations were also consistent with reasonable, lawful business decision making. 31 U.S.C.A. § 3729 et seq.; Social Security Act § 1128B, 42 U.S.C.A. § 1320a-7b(b)(2); Tex. Rev. Civ. Stat. art. 581–33. *United States v. Catholic Health Initiatives*, 312 F. Supp. 3d 584 (S.D. Tex. 2018).

## [END OF SUPPLEMENT]

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### Footnotes

<sup>1</sup> *Rockwell Intern. Corp. v. U.S.*, 549 U.S. 457, 127 S. Ct. 1397, 167 L. Ed. 2d 190 (2007).

<sup>2</sup> 31 U.S.C.A. § 3730(a), referring to 31 U.S.C.A. § 3729.

<sup>3</sup> 31 U.S.C.A. § 3730(a), referring to 31 U.S.C.A. § 3729.

<sup>4</sup> *United States ex rel. Uhlig v. Fluor Corp.*, 839 F.3d 628 (7th Cir. 2016); *United States ex rel. Donegan v. Anesthesia Associates of Kansas City, PC*, 833 F.3d 874 (8th Cir. 2016); *United States ex rel. McGrath v. Microsemi Corporation*, 140 F. Supp. 3d 885 (D. Ariz. 2015), *aff'd*, 2017 WL 1829109 (9th Cir. 2017); *United States ex rel. Kolchinsky v. Moody's Corporation*, 162 F. Supp. 3d 186 (S.D. N.Y. 2016); *In re Syntax-Brilliant Corporation*, 554 B.R. 323 (Bankr. D. Del. 2016).

Under the FCA, a private person can bring an action on behalf of the government (and herself) alleging that a third party submitted a false or fraudulent claim for payment to the government. *U.S. ex rel. Burke v. Record Press, Inc.*, 816 F.3d 878 (D.C. Cir. 2016).

<sup>5</sup> 31 U.S.C.A. § 3730(b)(1), referring to 31 U.S.C.A. § 3729.

<sup>6</sup> 31 U.S.C.A. § 3730(b)(1).

<sup>7</sup> *U.S. ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908 (4th Cir. 2013), *cert. denied*, 135 S. Ct. 2376, 192 L. Ed. 2d 177 (2015).  
Citizen-relators bringing qui tam suits on behalf of the government have Article III standing. *Achal v. Gate Gourmet*,

Inc., 114 F. Supp. 3d 781 (N.D. Cal. 2015).

As to damages, generally, see § 88.

United States v. Berkeley Heartlab, Inc., 225 F. Supp. 3d 487 (D.S.C. 2016).

U.S. ex rel. Beauchamp v. Academi Training Center, 816 F.3d 37 (4th Cir. 2016); United States v. Majestic Blue Fisheries, LLC, 196 F. Supp. 3d 436 (D. Del. 2016).

Hamilton v. JPMorgan Chase Bank, 118 F. Supp. 3d 328 (D.D.C. 2015).

Canen v. Wells Fargo Bank, N.A., 118 F. Supp. 3d 164 (D.D.C. 2015).

Relator in a qui tam action under the FCA cannot proceed pro se. *In re Syntax-Brilliant Corporation*, 554 B.R. 323 (Bankr. D. Del. 2016).

United States ex rel. Shea v. Cellco Partnership, 863 F.3d 923 (D.C. Cir. 2017).

31 U.S.C.A. § 3730(b)(1).

Jallali v. Nova Southeastern University, Inc., 486 Fed. Appx. 765 (11th Cir. 2012).

United States ex rel. Conteh v. IKON Office Solutions, Inc., 27 F. Supp. 3d 80 (D.D.C. 2014).

31 U.S.C.A. § 3730(b)(2), referring to Fed. R. Civ. P. 4(d)(4) and further providing that the complaint must be filed in camera, must remain under seal for at least 60 days, and may not be served on the defendant until the court so orders. The FCA's seal requirement is a mandatory rule relators must follow. *State Farm Fire and Cas. Co. v. U.S. ex rel. Rigsby*, 137 S. Ct. 436, 196 L. Ed. 2d 340 (2016), further providing that the question whether dismissal is appropriate for violation of FCA's seal requirement should be left to the sound discretion of the district court. As to extensions of time, see 31 U.S.C.A. § 3730(b)(3).

United States ex rel. Kolchinsky v. Moody's Corporation, 162 F. Supp. 3d 186 (S.D. N.Y. 2016).

31 U.S.C.A. § 3730(b)(2).

31 U.S.C.A. § 3730(b)(4), referring to 31 U.S.C.A. § 3730(b)(3).

United States ex rel. Forcier v. Computer Sciences Corp., 183 F. Supp. 3d 510 (S.D. N.Y. 2016).

United States ex rel. Sansbury v. LB & B Associates, Inc., 58 F. Supp. 3d 37 (D.D.C. 2014).

United States ex rel. Michaels v. Agape Senior Community, Inc., 848 F.3d 330 (4th Cir. 2017); *United States v. Sprint Communications, Inc.*, 855 F.3d 985, 97 Fed. R. Serv. 3d 872 (9th Cir. 2017); *United States ex rel. Landis v. Tailwind Sports Corp.*, 98 F. Supp. 3d 8 (D.D.C. 2015); *United States v. Whyte*, 229 F. Supp. 3d 484 (W.D. Va. 2017), appeal dismissed, 2017 WL 2377934 (4th Cir. 2017).

United States v. Supervalu, Inc., 218 F. Supp. 3d 767 (C.D. Ill. 2016).

*State Farm Fire and Cas. Co. v. U.S. ex rel. Rigsby*, 137 S. Ct. 436, 196 L. Ed. 2d 340 (2016).

31 U.S.C.A. § 3730(b)(5).

The term "pending" means remaining undecided; awaiting decision. *United States v. Unisys Corporation*, 178 F. Supp. 3d 358 (E.D. Va. 2016).

*United States v. Unisys Corporation*, 178 F. Supp. 3d 358 (E.D. Va. 2016).

*United States ex rel. Kelly v. Novartis Pharmaceuticals Corporation*, 827 F.3d 5 (1st Cir. 2016).

The jurisdictional analysis under the FCA's first-to-file bar is governed by the "material elements test," under which a later suit is barred if it is based upon the same material elements of fraud as the earlier suit even though the later suit may not involve identical facts and details. *United States v. Unisys Corporation*, 178 F. Supp. 3d 358 (E.D. Va. 2016).

*United States v. Unisys Corporation*, 178 F. Supp. 3d 358 (E.D. Va. 2016).

- 29 United States v. Unisys Corporation, 178 F. Supp. 3d 358 (E.D. Va. 2016).
- 30 United States v. Unisys Corporation, 178 F. Supp. 3d 358 (E.D. Va. 2016).
- 31 United States ex rel. Shea v. Cellco Partnership, 863 F.3d 923 (D.C. Cir. 2017).
- 32 U.S. v. University of Massachusetts, Worcester, 80 F. Supp. 3d 296, 320 Ed. Law Rep. 236 (D. Mass. 2015).
- 33 Schroeder v. U.S., 793 F.3d 1080 (9th Cir. 2015).
- 34 31 U.S.C.A. § 3730(d)(1), referring to 31 U.S.C.A. § 3730(b).
- 35 31 U.S.C.A. § 3730(d)(1).  
As to public disclosure as a defense resulting in dismissal, see §§ 90 to 92.
- 36 U.S. ex rel. Simmons v. Samsung Electronics America, Inc., 116 F. Supp. 3d 575 (D. Md. 2015).
- 37 U.S. ex rel. Simmons v. Samsung Electronics America, Inc., 116 F. Supp. 3d 575 (D. Md. 2015).
- 38 U.S. ex rel. Simmons v. Samsung Electronics America, Inc., 116 F. Supp. 3d 575 (D. Md. 2015).
- 39 Rille v. PricewaterhouseCoopers LLP, 803 F.3d 368 (8th Cir. 2015).
- 40 31 U.S.C.A. § 3730(d)(2).
- 41 31 U.S.C.A. § 3730(d)(2).
- 42 31 U.S.C.A. § 3730(d)(3), referring to 31 U.S.C.A. § 3729.
- 43 Schroeder v. U.S., 793 F.3d 1080 (9th Cir. 2015).
- 44 31 U.S.C.A. § 3730(d)(4).